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NOTES.

LAWYERS must speak with some degree of respect of a contention which was upheld, though not unanimously, by the Court of Appeal, and found favour with one law lord. But plain men will think that the House of Lords, in *Powell* v. *Main Colliery Co.* [1900] A. C. 366, 69 L. J. Q. B. 758, did a good deed by construing the Workmen's Compensation Act in accordance with its general beneficent intention and common sense. The 'claim for compensation' which must be made within six months of the accident in order to obtain the benefit of the Act need not be a claim by a judicial proceeding in the county court. A notice of claim addressed to the employer is sufficient. It will be observed that Lord Justice Romer's dissenting judgment in the Court of Appeal, being fully adopted by Lord Davey in the House of Lords, now acquires the highest rank of authority. We have more than once called attention to the amount of litigation raised by this Act, of which some at least might have been avoided by better workmanship. It is only fair to add that the general success of the Act must be measured by the number not of disputed cases, but of those—naturally unknown to readers of law reports—which are settled in a summary manner, or without any dispute at all.

It was easy to foretell (see L. Q. R., p. 104 *ante*) that *De Nicols* v. *Curlier* [1900] A. C. 21, 69 L. J. Ch. 109, would sooner or later raise the question how far a French marriage between French citizens domiciled in France affects the rights of the parties in regard to English land.

This prediction has been verified by *In re De Nicols* [1900] 2 Ch. 410. The judgment of Kekewich J. in that case in effect determines, as far as the matter can be decided by a Court of first

instance, that where *H* and *W*, French subjects domiciled in France, have married subject to the *régime de la communauté*, though without otherwise making any express marriage contract, there exists in effect a special marriage contract defined by reference to the French code, and that this contract has the same binding effect as an express contract, and is enforceable against real and leasehold property in England; and the judgment of Kekewich J. is apparently a fair application of the principle laid down by the House of Lords in *De Nicols* v. *Curlier*, though their lordships in the particular case applied it only to movable property.

To the student of the rules maintained by English Courts with regard to the conflict of laws, the two cases, *De Nicols* v. *Curlier* [1900] A. C. 21, and *In re De Nicols* [1900] 2 Ch. 410, 69 L. J. Ch. 680, have the greatest importance and suggest two observations.

(1) The decision of the House of Lords, as interpreted by Mr. Justice Kekewich, does in substance, though not in form, make a serious inroad upon the principle maintained by English tribunals, and unhesitatingly accepted by American and English authorities, that all rights, interests, and titles in and to immovable property are exclusively governed by the *lex situs* (see Story, Conflict of Laws, s. 424; Westlake, Private International Law, 3rd ed., p. 189; Dicey, Conflict of Laws, p. 516). It is clear that where French citizens marry in France in the ordinary way the rights of husband and wife in regard to English land are governed in effect not by the law of England (*lex situs*) but by the law of France. And be it noted that the principle of *De Nicols* v. *Curlier* clearly applies to a marriage governed by the law of any country where the Code Napoléon, or any modification of the Code Napoléon, or indeed where any Code governing the property rights of the parties to a marriage exists.

(2) Our Courts will be ultimately compelled by the force of logic to adopt the doctrine advocated by Savigny, Bar, and on the whole by the best continental authorities, that the law of the country to which a husband and wife are subject at the time of their marriage (which law, according to English views, is in general the *lex domicilii* of the husband) regulates their property rights during the whole of their married life; and that in this matter no distinction should be drawn between immovable and movable property.

The rule of the *lex situs* is formally intact for this reason: the foreign 'statutory settlement' implied in the *régime de la communauté* does not operate by way of creating any estate, even equitable, in English land, but as an executory contract for the disposal of the

land in question; a contract which it is, and always was, open to the parties to make anywhere and in their own way, so long as it does not stipulate for the creation of estates or interests unknown to English law.

We have constantly insisted in this REVIEW upon two considerations often overlooked by students of private international law. The one is that this branch of law has been developed in England almost entirely by the process of judicial legislation. The other is that our judges have exhibited extraordinary legislative activity in this department during the last half century, and have thus filled up one by one a number of gaps in our system for determining the conflict of laws.

Each of these observations is illustrated by the recent case of *Viditz* v. *O'Hagan* [1900] 2 Ch. 87, 69 L. J. Ch. 507, C. A.

It has long been a speculative question to which no precise answer has hitherto been supplied by English decisions, how far a person, on passing under the dominion of a new personal law, is affected by incapacities imposed thereby.

This question was raised in a curious shape in *Viditz* v. *O'Hagan*, of which the facts may for our present purpose be thus broadly stated.

W is an Englishwoman domiciled in England, and an infant. She marries an Austrian citizen domiciled in Austria. The marriage takes place at the British Legation in Switzerland, and must admittedly be treated as if it were a marriage celebrated in England. *W* executes, immediately before her marriage, a marriage settlement under which all her after-acquired personal property is settled upon herself and her husband for life, and then upon the issue of the marriage. Such a settlement is, under Austrian law, void, or at any rate can be avoided at any time by the husband and wife. *W*, by her marriage, becomes an Austrian subject domiciled in Austria. Long after *W* has become of age she executes a deed meant to carry out the terms of the settlement. Some years later *W* and her husband execute in Austria a notarial document intended to revoke the marriage settlement and the subsequent deed, and this notarial document does, under Austrian law, avoid the settlement and the deed. Money devolves upon *W*; it is in the hands of the trustees of the settlement. Is it bound by the terms of the settlement, or is the settlement void? There is no doubt that, if *W* had continued subject to English law, the settlement which she did not repudiate till long after she came of age, though originally voidable by her, must have been treated as ratified (*Cooper* v. *Cooper*, 13 App. Cas. 88; *Edwards* v. *Carter* [1893] A.C.

960. If, on the other hand, the validity of the settlement depends upon Austrian law, it must clearly be held invalid. The Court of Appeal, reversing the judgment of the Court below, have held that *W* on her marriage became subject, as regards her personal capacity, to the law of her Austrian domicil, whence the result follows that a contract which was voidable under the law of England, and was void under the law of Austria, could not at any time become valid. The conclusion appears to be sound and to be really a fair deduction from the general principle that contractual capacity depends upon the law of a person's domicil. It is, however, undoubtedly the case that in drawing what appears to be a sound logical deduction from admitted principles, the Court of Appeal have filled up a gap in the rules of private international law as maintained by English Courts.

In re Martin [1900] P. 211, 69 L. J. P. 75, C. A. raises several knotty questions of private international law. It decides however one point only, namely, that if *W*, a Frenchwoman domiciled in France, makes a will of movables and afterwards marries *H*, who at the time of the marriage, as well as at the time of *W*'s death, is, though a French citizen, domiciled in England, then the marriage is a revocation of *W*'s will, and if she executes no other *W* dies, according to English law, intestate.

The Court of Appeal held (though Lindley M.R. dissented) that *H* was at the time of his marriage with *W*, as also at her death, domiciled in England. But even on this view of the fact the judgment of the Court is open to criticism. It is strange that neither counsel nor judges called attention to Lord Kingsdown's Act, 24 & 25 Vict. c. 114, s. 3, which provides that 'no will or other testamentary instrument shall be held to be revoked or to have become invalid . . . by reason of any subsequent change of domicil of the person making the same.' Now it is admitted that if *W*, who when she made her will was domiciled in France, had retained her French domicil until her death, her will would not have been revoked. But if so it is at least arguable that, in virtue of Lord Kingsdown's Act, a change of domicil, even though caused by marriage, cannot have worked a revocation of *W*'s will. One is the more surprised that this point, whatever its worth, was not taken, since as early as 1866 Sir J. P. Wilde called attention to the possible effect of 24 & 25 Vict. c. 114, s. 3 on the revocation of a will by marriage (see *In Goods of Reid* (1866), L. R. 1 P. & D. 74, 76.

Should *In re Martin* be taken to the House of Lords, it is more than possible that their lordships may agree with the President of the Probate Division and with Lindley M.R. in holding that the

husband retained his French domicil. Should they take this view of the facts, they will hardly dissent from the masterly exposition of the law by the ex-Master of the Rolls.

H.M.S. *Sans Pareil* [1900] P. 267, C.A. is disappointing. It narrowly escaped being a leading case upon more than one difficult point of general, statutory, and admiralty law; but the net result of four lengthy judgments, delivered after consultation with four nautical assessors, is no more than this,—the *Sans Pareil* did not see, as she ought to have seen, the *East Lothian* in time to avoid her. Upon the one question of general interest expected to be raised and decided by the case, no decision was arrived at, because it was not raised by the facts. That question, a very practical and a very important one, is, Whether a single steamship (or, as here, a ship in tow of a tug) crossing a fleet of warships in close formation must, under Article 27 of the Regulations for preventing collisions at sea, keep out of the way of the fleet, or whether the fleet must, under Article 19, keep out of the way of the ship? Unfortunately the three judges of the Court of Appeal, A. L. Smith, Vaughan Williams, and Romer L.JJ., agreeing with their nautical advisers, answered this question *obiter* in favour of the fleet, whilst Barnes J. and the Trinity Brethren answered it in favour of the single ship. Had there only been a decision upon the point, the seaman who has to apply the Regulations, or at least the lawyer who has to advise the shipowner after a collision, might have learnt something by the case. As it is three judges and two assessors advise the navigator that the law requires him to keep clear of the fleet, whilst one judge and two assessors advise the contrary. What is the unfortunate man to do? Since experts disagree, and Romer L.J. has set the example, we are tempted to express the opinion that it is neither prudent nor seamanlike for a tug with 200 yards of tow line and a tow astern of her, to attempt to thread her way through four lines of heavy ships going ten knots in close formation. If there were no rule of the road at sea, and no Articles 19 and 21 on the statute-book, there could scarcely be a question upon the matter; and (*pace* Barnes J. and the Trinity Brethren) we cannot think that the Regulations are so perverse as to require the seaman to cause what seems to us an entirely unnecessary risk both to himself and to the ships of the fleet. We strongly advise him to read and digest the strongly worded and very practical judgment of Romer L.J.

The other important points of general and statute law which were discussed in the case can only be noticed here. No decision

was arrived at upon any one, though strong opinions were expressed upon some of them. If the officer in charge of the *Sans Pareil* had seen the tug in time, would the initial fault of the tug in attempting to cross the fleet (if fault it was) have been a proximate cause of the loss? Can one of Her Majesty's ships be 'deemed to be in fault' under s. 419 of the M. S. Act 1894? Can any ship be 'deemed to be in fault' for not observing Article 27? Can a merchant ship be 'deemed to be in fault' where the other ship is a Queen's ship, and as such is not subject to the statutory Regulations? No authoritative answers to these questions will be found in H.M.S. *Sans Pareil*, and in view of the diversity of judicial opinion expressed small assistance towards answering them may be gleaned from the case.

The judgments in *Rice* v. *Noakes* ([1900] 2 Ch. 445, 69 L. J. Ch. 643, C. A.), elaborate as they are, still leave us with a feeling that the mystery of the tied house and the doctrine of clogging the equity of redemption, and the relation of these to one another, are not satisfactorily cleared up. The doctrine of clogging, we are told, remains as unimpaired as ever, and no doubt this is so. What has changed under the influence of modern life and modern business methods is, not the doctrine of equity, but the mortgage contract. In old days the Court allowed the mortgagee to claim nothing but his principal and interest. In these days it allows mortgagor and mortgagee to make what bargain they like, provided it is not oppressive on the mortgagor. The mortgagee may stipulate, for instance, that he shall not be paid off for, say, seven years; or, if the property mortgaged is a theatre—a precarious form of security—the mortgagee may stipulate that he shall be paid in a share of the profits; if the security is a public house, the mortgagee may stipulate for a tie—a covenant by the mortgagor to take all his beer from the mortgagee. This freedom of contract is advantageous—as Courts in modern times have recognized—to both parties. The mortgagor is able to borrow more easily and on better terms; the mortgagee gets his consideration in the form which suits him best: but it is misleading to treat the transaction in these cases as a mortgage plus a collateral stipulation. It is one entire bargain for the loan of money on security, and before the Court can apply the doctrine of clogging the equity of redemption, it must first find out what the bargain between the parties was; for what does it mean, this equity of redemption? It means the mortgagor's right to have his security back on fulfilment by him of the terms of the bargain, not restricted, as in old days, by the Courts—under the apprehension of oppressiveness—to principal and interest only, but inter-

preted in the light of the modern cases which have sanctioned a much greater latitude and diversity of terms where mortgagor and mortgagee are contracting, terms corresponding to changes in business methods. Whatever these terms are, so long as they remain unfulfilled there is no present right to redeem, and therefore there can be no clogging of the equity in any proper sense. The fact of the mortgagor being by the terms of the mortgage deed reinstated in possession of the mortgaged premises before completion of the whole bargain, need not make a continuing term of the bargain—like a tie—a clog.

N, a rate collector, fraudulently obtains a cheque for £142 from *A*; it is drawn to his order upon a London bank, crossed generally, and marked 'not negotiable.' *N* endorses the cheque and cashes it at the bank of *X & Co.* where he has no account, but where he habitually cashes cheques. The proceeds are partly applied by *X & Co.* in accordance with *N*'s directions. The balance is handed to him in cash. *X & Co.*, in good faith and without negligence, receive payment of the cheque from the London bank on which it is drawn. *A* afterwards discovers the fraud of *N*, and demands from *X & Co.* the return of the money, which is refused. It is held by the Court of Appeal (*G.W.R. Co.* v. *London and County Banking Co.* [1900] 2 Q. B. 464, 69 L. J. Q. B. 741), *dubitante* Vaughan Williams L.J., that, though the cheque is marked 'not negotiable,' *X & Co.* have, under the circumstances, a right to retain the money received by them from the London bank in payment of the cheque.

The judgment of the Court of Appeal may, in spite of the doubt expressed by Vaughan Williams L.J., be good law, but it must be unsatisfactory to the ordinary public. It gives an excessively wide meaning to the word 'customer' (see *Matthews* v. *Brown & Co.*, 63 L. J. Q. B. 494, and *Lacave & Co.* v. *Crédit Lyonnais* [1897] 1 Q. B. 148), and through this wide interpretation so extends the protection given to bankers by the Bills of Exchange Act, 1882, s. 82, as almost to nullify the salutary provision of s. 81, under which a person who takes a crossed cheque which bears on it the words 'not negotiable,' does not obtain a better title to the cheque than that which the person from whom he took it had. If the Court of Appeal is right, any rogue who is accustomed to cash cheques at a bank may defeat the protection meant to be given to any one who had the prudence to mark a cheque with the words 'not negotiable.' The decision affords a fresh reason for preferring the form of crossing 'account payee,' which is now common.

It was a neatly constructed argument which counsel presented to the Court of Appeal in *In re Dixon*, 69 L. J. Ch. 609, but it overlooked a point of old learning—the distinction between a bond with a penalty and a bond without a penalty—and it consequently tumbled down like a house of cards. The distinction is not a pure technicality; the penalty annexed means, as Equity in relieving against it has long read it, that the obligee is to have his principal and interest, not merely damages as in a simple bond. This became very material in *In re Dixon* (69 L. J. Ch. 609), where a husband had borrowed money of his wife and given her a bond conditionally in a penalty for repayment, and the bond had lain for twenty years among the husband's papers unredeemed; for on the above principle it still remained an interest-bearing security. Still there was the fact that no interest had been paid to the wife, and the husband's executors took advantage of it to set up the Statute of Limitations. Fortunately our judges are men of the world as well as good lawyers. They know that husbands and wives living together in amity do not keep debtor and creditor accounts against one another—often indeed have a common purse—and the Court of Appeal, in this instance, were not going to spoil such conjugal confidence and sow distrust in its stead. A judge's function, according to the late Lord Esher, is to give a good legal reason for the conclusions of common sense, and the Court had plenty of them ready in the husband's trusteeship, and the hand to pay and to receive being the same.

We doubt whether Parliament, when it passed the Public Authorities Protection Act, 1893, really contemplated the special protection of such defendants as the statutory governing body of a hospital sued for damage caused by the negligence of a nurse employed in the hospital: *Markey* v. *Tolworth, &c., Hospital District Board* [1900] 2 Q. B. 454, 69 L. J. Q. B. 738, where the only question argued and decided was on the date at which the damage accrued and from which, therefore, the six months' limitation ran. Hospital boards are not very like the justices, sheriffs, or constables who were protected by earlier partial enactments in the execution of duties, an execution necessarily productive of damage to some one, and sometimes, by misadventure, to the wrong persons, or otherwise unjustifiably. But the words of the Act are clearly sufficient to cover such cases, and it is not for the Courts to limit the charity of the Legislature on mere speculation. The actual decision is that in an action under the Fatal Accidents (commonly called Lord Campbell's) Act the cause of action accrues at the death of the deceased person,

and not at some later time or times to be fixed in some way by reference to the pecuniary loss suffered at one time, or from time to time, by the plaintiffs. This seems correct, if only on the ground of obvious convenience.

No government will, under the conditions of modern Parliamentary legislation, undertake to consolidate and amend the Income Tax Acts, but a minister endowed with Quixotic public spirit could render no greater service to the public than to revise and re-enact the whole income-tax law, which as it stands is at once antiquated, complicated, and obscure. Hardly a month passes without cases being reported which, considering that the tax has been in force for nearly sixty years, ought not to require decision.

Such a case is *Beaumont* v. *Bowers* [1900] 2 Q. B. 204, 69 L. J. Q. B. 600. *T*, a clerk to the guardians of a union, is, under the Poor Law Officers' Superannuation Act, 1896, compelled to contribute £15 of his annual salary to a superannuation fund. He claims under the Income Tax Act, 1842, s. 146, to deduct this sum from the amount at which he is assessed to income tax as a 'sum chargeable on his salary by virtue of an Act of Parliament.' The claim, though resisted by the Crown, was held to be valid by the Q. B. D. In this case the ambiguities of the Income Tax Acts made doubtful the right to an exemption which Parliament certainly meant to grant.

Armitage v. *Moore* [1900] 2 Q. B. 363, 69 L. J. Q. B. 614, simply decides, though under rather complicated circumstances, that income tax under Schedule D is payable by a trustee on profits made by him in carrying on a business on behalf of the creditors of an insolvent firm. Here the claim of the Crown would appear to be clear. All that can be said against it is that the uncertainty of our income-tax law suggests or justifies resistance to the demands of the Inland Revenue whenever novel circumstances make it possible plausibly to question the application of even the best-established principle of revenue law.

The Gracchi complaining of sedition, or the pot calling the kettle black, are but mild illustrations of that sense of incongruity, or worse, which we feel in one spouse, not himself or herself blameless, exacting the penalty of infidelity or of any other matrimonial offence against the other; when, for instance, a husband, guilty of cruelty, seeks to put away his wife for adultery. He may technically have the law on his side, but for him to invoke it accords but

ill with that reciprocity of matrimonial obligation which is of the essence of the union. This problem of matrimonial ethics, which is constantly recurring, is one of far too great nicety to be met by any hard and fast rule of law; it can only be solved by judicial discretion; it was so dealt with in the old Ecclesiastical Court; and the Matrimonial Causes Act of 1857 has but perpetuated that discretion. It has perpetuated also, it would seem (*Pryor* v. *Pryor* [1900] P. 157, 69 L. J. P. 99), the principles upon which the old discretion was exercised, and one of those principles was that where a husband himself guilty of cruelty sought a divorce on the ground of his wife's adultery, the cruelty was not a bar to his claim unless it conduced to the adultery. Here is scope for a volume of casuistry. But after all it profits little—this nice balancing of conjugal equities or iniquities against one another. The important thing practically is the situation brought about by the Court refusing relief—the matrimonial deadlock. 'Deplorable' is the word used by the President to describe it. The husband is tied to a woman who has been found guilty of adultery and with whom he cannot be expected to live; the position of the wife is worse. She cannot compel her husband to maintain her or pledge his credit for necessaries; she cannot claim restitution of conjugal rights with the object of obtaining support from him, nor can she avail herself of the Summary Jurisdiction (Married Women) Act, 1895. In a word, the situation is a satire on marriage, and unfortunately it is one which is constantly repeating itself, not only in cases of the common guilt of the spouses, but in judicial separations. These judicial separations, especially those pronounced by magistrates under the summary jurisdiction, are, as Mr. John Macdonell's judicial statistics show us, becoming increasingly common, and, looking at the relations they create, represent a serious social danger.

Subtle and interesting are the questions of morality or casuistry raised by the rules as to fraudulent preference. *A*, when on the verge of bankruptcy, borrows £1,000 from *X*. He obtains the loan by the representation that it will enable him to pay off the whole of his existing liabilities, and under an implied agreement that the money lent shall be employed to pay his debts. *A* forthwith spends it for a different purpose, and absconds, thereby committing an act of bankruptcy. On the evening of the same day he posts a letter to *X* containing two bank notes of £500 each. Is this a fraudulent preference? Mr. Justice Wright in *In re Vautin* [1900] 2 Q. B. 325, 69 L. J. Q. B. 703, says it is not, and every one must be glad that

his lordship was able to arrive at a decision which satisfies ordinary moral sentiment. It is certain that *A* meant to repair a grievous wrong, and that he felt, as most men would feel, that it was a particularly base act of dishonesty to extort money from the kindness of a friend and then defraud him. To put the same thing in other words, *A* preferred, and, as many moralists will say, rightly preferred, that *X* should be repaid in full, and that what had been *X*'s money should not be equally divided among *A*'s creditors. But this very mode of putting the thing leaves a doubt whether *X* was not guilty from a legal point of view of fraudulent preference. The principle to be deduced from *In re Vautin* is well expressed in the head-note as follows: 'When a debtor, with bankruptcy impending, pays a creditor in the honest belief on reasonable grounds that he is legally bound to make the payment, it is not a fraudulent preference, even though the debtor is in fact under no legal obligation to make the payment.' Can this be good law? *A* is under a legal obligation to pay all his creditors, *X*, *Y*, and *Z*. He reasonably therefore supposes that he is under a legal obligation to pay *X* in full. He is from particular circumstances specially alive to the moral force of *X*'s claim. He prefers to pay *X*, and does so. May not this be, in law, a fraudulent preference of *X* to *Y* and *Z*? The right answer to this apparently puzzling question seems to be that the money was never *A*'s money unconditionally. Being advanced for a special purpose only, it did not become part of his general assets.

The policy of the Preferential Payments Acts in paying clerks and servants of an insolvent to a limited amount in priority to general creditors, and now even to debenture-holders, is a very considerate as well as just one. It is not merely that the hardship inflicted on these small creditors by bankruptcy or winding-up is greater than on claimants for a larger amount, but that their labour has to some extent helped to create or preserve the assets. But who is a 'servant'? Is a manager a servant? Yes. Is a managing director a servant? No. (*In re Newspaper Syndicate* [1900] 2 Ch. 349, 69 L. J. Ch. 578.) A managing director, according to Cozens-Hardy J. in that case, is just an ordinary director entrusted with some special powers, and the fact that he is paid a salary does not alter his position. A managing director is in fact a *Janus bifrons* uniting in himself two characters, that of general agent to the company and manager to the directors, but the directorial element predominates and determines his status. But in truth the managing director does not need to trust to the benevolence of the section. He, if any one, knows how the company's

affairs are going, and, if there is to be shipwreck, takes care to get hold of a life-preserver.

'Tua res agitur paries cum proximus ardet'; that is, you may get an injunction if the tenant of the flat under you sets up a restaurant kitchen range (*Sanders-Clark* v. *Grosvenor Mansions Co.* [1900] 2 Ch. 373, 69 L. J. Ch. 579). In *Reinhardt* v. *Mentasti* (42 Ch. D. 685, 58 L. J. Ch. 787) Kekewich J. decided a similar point in favour of a gentleman whose wine was overheated by the flue. There is something epicurean in the idea of stopping your neighbour from cooking in order that your wine cellar may be kept cool; some indeed might darkly hint that a wine cellar was hardly the subject of a legal grievance, as more allied, in Lord Justice Knight Bruce's language, to 'elegant and dainty modes and habits of living,' than 'plain and sober and simple notions among English people'; but, wine cellars apart, a flaming Ætna from a restaurant cooking range below is a source of reasonable uneasiness as well as of discomfort. There are always two sides to these injunction cases, however, as Lord Selborne remarked; the restaurant keeper may after all only be making a reasonable use of his premises, and if he is, he is not to be stopped. So Buckley J., following Lord Selborne, thinks, notwithstanding some *obiter dicta* to the contrary by Kekewich J. The difficulty is to say what is and what is not a reasonable user. Children's noises, the eternal scales of the schoolroom piano, dancing overhead and flirting on the stairs (*Jenkins* v. *Jackson*, 40 Ch. D. 71, 58 L. J. Ch. 124), these are the sort of things which the citizen of average firmness of mind must contemplate as possibilities of neighbourhood and domesticity, and put up with accordingly; but it is another matter when the ground floor of a house, say in Green Street, is turned into a stable (*Ball* v. *Ray*, L. R. 8 Ch. 467), or a residential flat into a club (*Hudson* v. *Cripps* [1896] 1 Ch. 265, 65 L. J. Ch. 328), or into a restaurant with a fiery flue. These are a perverting of the premises from their original design and natural user, which a neighbouring tenant cannot be expected to reckon with or endure.

T, a Frenchwoman domiciled in France, executes a will in a form which is valid according to French law. The will is intended to be made in execution of a power of appointment under an instrument which requires the power to be executed with special formalities. The will does not comply with these formalities. It is not, as the provisions of the Wills Act, 1837, ss. 9 and 10, do not apply, a good execution of the power of appointment.

This is all that is decided by *Barretto* v. *Young* [1900] 2 Ch. 339, 69 L. J. Ch. 605. The oddity of the thing is that the point decided should have been thought doubtful. The principle would appear to be perfectly clear that, except in cases where the Wills Act, 1837, applies, a will made in exercise of a power of appointment must comply with the terms of the power. The truth appears to be that *In re Kirwan's Trusts*, 25 Ch. D. 373, has been misunderstood, and *Hummel* v. *Hummel* [1898] 1 Ch. 642, 67 L. J. Ch. 363, is either wrongly decided or unexplainable, and that these two cases have introduced confusion into the law as to the exercise of powers of appointment by will.

Whoever is interested in the development of the law will do well to note such a case as *Bennett* v. *Harding* [1900] 2 Q. B. 397, 69 L. J. Q. B. 701. All that the case decides is that a stable yard and stables at which a large number of cabmen are in daily attendance for the purpose of hiring cabs is a workplace within the meaning of the Public Health (London) Act, 1891, s. 38, and therefore must be provided with suitable accommodation in the way of sanitary conveniences. The judgment of the Court is likely enough to be right, though we suspect that some years ago judges would have been inclined to hold that the generality of the word 'workplace' was to a certain extent cut down by the preceding words 'factory' and 'workshop.' Grant however that the decision is right, the terms 'factory,' 'workshop,' and 'workplace' each mark a stage in the advance of State interference with the conduct of private business, and *Bennett* v. *Harding* itself proves that the courts are no longer inclined, as they certainly were some fifty years ago, to limit rather than extend Parliamentary inroads upon the principle of *laissez faire* (to which the Common Law has never committed itself, whatever the policy of legislation might be). Compare with *Bennett* v. *Harding* the *Savoy Hotel Co.* v. *London County Council* [1900] 1 Q. B. 665, 69 L. J. Q. B. 274, on which we commented in our last number.

It is really as difficult to feel any sympathy with the grievances of the floating debenture-holder as with the disappointed howls of the Virgilian wolf trotting round the sheepfolds while the timid sheep—otherwise the anxious, unsecured creditors—are bleating within. French law will have nothing to do with the floating security as we understand it, regarding—not unnaturally—such a charge as a fraud on the general creditors of a company; for what is the position of debenture-holders with a floating charge? They allow the company to go on trading—contracting obliga-

tions—as if there were no charge subsisting. But no sooner does the general creditor seek to enforce his rights than the debenture-holders start up like Roderick Dhu's warriors, armed for strife, and intercept his lawful execution. Debenture-holders, however, cannot have it both ways, the advantage of a floating charge over all the assets, present and future, and at the same time the right to object to the company dealing with the property in the way it thinks best, which was what they wanted to do in *In re Vivian & Co.*, 69 L. J. Ch. 659. The company there carried on business at three different centres. Two of the businesses proved profitable, the other did not, and the company proposed to get rid of it, but the debenture-holders said, 'No; this is part of our security, and the transaction is not one in the "ordinary course of business."' If the company had been trying to sell the whole of its undertaking, the debenture-holders might have been right (*Hubbuck* v. *Helms*, 56 L. T. 232); but it is quite different where it is only a portion of the undertaking, and where the interests of the company require the directors to part with it. The debenture-holders, by taking such a form of security, have elected in substance to subordinate their rights to the directors' discretion in carrying on the business, and they must accept the consequences of the bargain.

We have no special law in England for the prodigal who has passed infancy without reaching years of discretion. Mr. Hagberg Wright thinks it a pity we have not (L. Q. R. xvi. 57), but in the meantime it would be unfortunate if the law were to discourage attempts by the extravagant to save them from themselves and put their property beyond the reach of temptation. Such was the settlement made in *In re Lane Fox* [1900] 2 Q. B. 508, 69 L. J. Q. B. 722. The young lady there was possessed of a fortune, and with laudable discretion she settled it on herself in the names of trustees, paying off all her existing creditors. Then, made too secure perhaps by the virtue of her act of renunciation, she yielded to feminine extravagance and ended in bankruptcy: for there is no assurance, as prudent friends fondly imagine, that, because a person has nothing to pay with, he or she will not incur debts. The settlement in *In re Lane Fox* could not be challenged under s. 47 of the Bankruptcy Act, 1883—though the trustee tried that course at first—because the settlor was solvent at the time she made it, so the only thing to be done was to try and impeach it under 13 Eliz. c. 5, as made to defeat and delay creditors: but here again was a stumbling-block in the way of the trustee: it was impossible to impugn the honesty of the settlor. The nearest

analogy is in that class of cases where a person solvent at the time contemplates engaging in some hazardous business, and before doing so settles property in order to put it out of the reach of his prospective creditors (*Stileman* v. *Ashdown*, 2 Atk. 481), but in such a case the design is plainly fraudulent. A settlement is not fraudulent, it must be borne in mind, because it defeats creditors. Every settlement puts property out of the reach of creditors. That is the very object of it.

Lord Russell of Killowen was not one of those judges whose wealth of learning passes into the substance of the law, leaving it enriched for all time to come. His faculties were great, but different from those of a Willes, a Blackburn, a Westbury, or a Cairns. And yet his premature death is a grave loss, not only to the strength and dignity of justice, but to the science of law. For the late Chief Justice had two qualities which are even more important in judicial high places than technical learning. Like all really great advocates, he seized on the vital points in complex bodies of fact with swift and sure apprehension; and when he was dealing with interests larger than those of individual clients, this power was at the service of a wide and liberal vision. His address to the American Bar Association, published in these pages (L. Q. R. xii. 311), is a worthy exposition of the traditional and sound conception of the law of nations as against the lamentably narrow views to which some English statesmen and judges have committed themselves in recent times. Here, too, we are specially bound to remember that he was foremost among the minority of persons in authority who have striven, in the face of professional prejudice and public apathy, to establish an efficient system of training for English lawyers. Sooner or later this will be done, but without Lord Russell of Killowen's masculine sense and untiring eloquence we sorrowfully confess that for the present the prospect seems more distant.

At the annual meeting of the American Bar Association, held at Saratoga Springs, New York, August 31, 1900, Professor James Bradley Thayer, of Massachusetts, moved the adoption of the following minute:

'The American Bar Association has heard with peculiar sorrow of the death of Lord Russell of Killowen, Lord Chief Justice of England, and desires to enter upon its records some permanent expression of honour and esteem for his memory.

The members of this Association had followed and known well

that brilliant career which made Sir Charles Russell the conspicuous and admired leader of the English Bar, and they had rejoiced at the elevation of one so competent to the great office which he held with such distinction at the time of his death. Four years ago we welcomed him here as our chief guest. Recalling now the noble address which he delivered to us on the 30th of August, 1896, and the deep-felt enthusiasm inspired in the hearts of all who listened to him, the members of this Association desire to express their admiration for the manner in which he has filled his high office, their grateful recollection of his visit here, their affectionate regard for his memory, and their respectful sympathy with the Bench and Bar of England in so great a loss to our common profession.'

The minute was duly seconded and was unanimously adopted by a rising vote.

Mr. Francis Rawle, of Philadelphia, moved the adoption of the following minute:

'On July 27, a banquet was given in London in the ancient hall of the Middle Temple by the Bench and Bar of England to their brethren of the Bench and Bar of the United States. The American Bar Association desires to place upon its record its hearty acknowledgement of this fraternal act and a cordial reciprocation of the sentiments which prompted it.'

The minute was duly seconded and was unanimously adopted.

The public who watched with interest the controversy carried on between Sir Edward Fry and the solicitors and others who have attempted to defend the taking by agents of secret commissions in respect of work done on behalf of their principals, should bear in mind two facts.

1. All money received by an agent, when contracting for a principal without the knowledge of his principal, from the other party to the contract, is the money of the principal, and may be recovered by him, not only in a Court of Equity, but also in any Common Law Court.

2. The illegality, no less than the immorality, of the receipt of a commission by an agent depends wholly upon its secrecy. Any agent, whether he be a solicitor or a cook, can satisfy the requirements at once of the law and of honesty by telling the principal for whom he acts of the commission that he receives, and obtaining his employer's leave to retain it.

These two facts dispose of every attack on the principle of the bill brought forward by the late Lord Russell of Killowen, and meet nine-tenths of the fallacies by which solicitors have tried to answer the unanswerable arguments of Sir Edward Fry.

In the last week of July and the first days of August two legal congresses were held in Paris, one for the comparative history of law, being a section of a more general historical congress, the other for comparative jurisprudence, under the auspices of the Society of Comparative Legislation. No harm was done by the overlapping of their subject-matter, as it was easy to take part in both. Some time must elapse before the proceedings of either are published in a complete form. As every system of law in Europe, and at least one in Asia, was represented, the topics were sufficiently various. Slavonic learning was particularly strong in the persons of Mr. Kovalevsky—well known of old to English scholars—and Mr. Bogišić, who has returned to Paris after a term of office as Minister of Justice in Montenegro. The Congress of Comparative Jurisprudence has done one thing which, we hope, will be permanently fruitful. A project to the effect (to put it shortly) of establishing a central intelligence office for law and legislation was submitted by Mr. Kelly of the New York Bar, supported by M. Lyon-Caen, with certain modifications which the proposer accepted, and favourably received in principle. A special committee was appointed at the final meeting of the Congress to consider it and take such further action as might seem desirable.

The *Institut de Droit International* has, by a large majority of votes, condemned the theory of *Renvoi*[1]. At the Cambridge meeting in 1895 a strong committee was appointed, on the motion of Professor Buzzati, of Pavia, to consider the question, and at Copenhagen, in 1897, it presented an 'Avant-Rapport,' principally with a view to obtaining fresh instructions as to the scope of the inquiry, which some members of the committee thought should include, while others thought it should exclude, the interpretation to be placed by courts upon existing legislative provisions upon the subject. The latter view was adopted by the *Institut*, and the carefully reasoned report upon the theory of *Renvoi*, *Rinvio*, or *Rück- und Weiterverweisung*, presented at the Hague in 1898, was drafted accordingly. It is distinctly hostile to the doctrine, which it formulates as follows: 'La loi étrangère que la LEX FORI déclare applicable pour juger un rapport juridique donné n'est pas la disposition étrangère de droit civil, mais la disposition étrangère de droit international privé correspondante à la disposition de droit international privé de la LEX FORI.'

The discussion of the report, after extending over two days at the Hague, was resumed at Neuchâtel in the present year, and

[1] Cf. L. Q. R. xiv. p. 231.

resulted in the adoption by the *Institut* of the following resolution: 'Chaque législateur, en édictant ses règles positives de droit international privé, doit indiquer quel est le droit matériel directement applicable par ses tribunaux dans les différents cas de conflits; il ne peut pas soumettre l'application du droit matériel, qu'il a indiqué comme applicable, à la condition que ce droit soit déclaré applicable aussi par la législation dont il fait partie.'

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE CORPORATION SOLE.

PERSONS are either natural or artificial. The only natural persons are men. The only artificial persons are corporations. Corporations are either aggregate or sole.

This, I take it, would be an orthodox beginning for a chapter on the English Law of Persons, and such it would have been at any time since the days of Sir Edward Coke [1]. It makes use, however, of one very odd term which seems to approach self-contradiction, namely, the term 'corporation sole,' and the question may be raised, and indeed has been raised, whether our corporation sole is a person, and whether we do well in endeavouring to co-ordinate it with the corporation aggregate and the individual man. A courageous paragraph in Sir William Markby's Elements of Law [2] begins with the words, 'There is a curious thing which we meet with in English law called a corporation sole,' and Sir William then maintains that we have no better reason for giving this name to a rector or to the king than we have for giving it to an executor. Some little debating of this question will do no harm, and may perhaps do some good, for it is in some sort prejudicial to other and more important questions.

A better statement of what we may regard as the theory of corporations that is prevalent in England could hardly be found than that which occurs in Sir Frederick Pollock's book on Contract [3]. He speaks of 'the Roman invention, adopted and largely developed in modern systems of law, of constituting the official character of the holders for the time being of the same office, or the common interest of the persons who for the time being are adventurers in the same undertaking, into an artificial person or ideal subject of legal capacities and duties.' There follows a comparison which is luminous, even though some would say that it suggests doubts touching the soundness of the theory that is being expounded. 'If it is allowable to illustrate one fiction by another, we may say that the artificial person is a fictitious substance conceived as supporting legal attributes.'

It will not be news to readers of this journal that there are nowadays many who think that the personality of the corporation

[1] Co. Lit. 2 a, 250 a.
[2] Markby, Elements of Law, § 145.
[3] Pollock, Contract, ed. 6, p. 107.

aggregate is in no sense and no sort artificial or fictitious, but is every whit as real and natural as is the personality of a man. This opinion, if it was at one time distinctive of a certain school of Germanists, has now been adopted by some learned Romanists, and also has found champions in France and Italy. Hereafter I may be allowed to say a little about it[1]. Its advocates, if they troubled themselves with our affairs, would claim many rules of English law as evidence that favours their doctrine and as protests against what they call 'the Fiction Theory.' They would also tell us that a good deal of harm was done when, at the end of the Middle Ages, our common lawyers took over that theory from the canonists and tried, though often in a half-hearted way, to impose it upon the traditional English materials.

In England we are within a measurable distance of the statement that the only persons known to our law are men and certain organized groups of men which are known as corporations aggregate. Could we make that statement, then we might discuss the question whether the organized group of men has not a will of its own—a real, not a fictitious, will of its own—which is really distinct from the several wills of its members. As it is, however, the corporation sole stops, or seems to stop, the way. It prejudices us in favour of the Fiction Theory. We suppose that we personify offices.

Blackstone, having told us that 'the honour of inventing' corporations 'entirely belongs to the Romans,' complacently adds that 'our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion[2].' If this be so, we might like to pay honour where honour is due, and to name the name of the man who was the first and true inventor of the corporation sole.

Sir Richard Broke died in 1558, and left behind him a Grand Abridgement, which was published in 1568. Now I dare not say that he was the father of 'the corporation sole'; indeed I do not know that he ever used precisely that phrase; but more than once he called a parson a 'corporation,' and, after some little search, I am inclined to believe that this was an unusual statement. Let us look at what he says:

Corporations et Capacities, pl. 41: Vide Trespas in fine ann. 7 E. 4, fo. 12 per Danby: one can give land to a parson and to his successors, and so this is a corporation by the common law, and elsewhere it is agreed that this is mortmain.

[1] Dr. Otto Gierke, of Berlin, has been its principal upholder. [2] 1 Comm. 469.

Corporations et Capacities, pl. 68: Vide tithe *Encumbent* 14. that a parson of a church is a corporation in succession to prescribe, to take land in fee, and the like, 39 H. 6, 14 and 7 E. 4, 12.

Encumbent et Glebe, pl. 14 [Marginal note: *Corporacion en le person*:] a parson can prescribe in himself and his predecessor, 39 H. 6, fo. 14; and per Danby a man may give land to a parson and his successors, 7 E. 4, fo. 12; and the same per Littleton in his chapter of Frankalmoin.

The books that Broke vouches will warrant his law, but they will not warrant his language. In the case of Henry VI's reign [1] an action for an annuity is maintained against a parson on the ground that he and all his predecessors have paid it; but no word is said of his being a corporation. In the case of Edward IV's reign we may find Danby's dictum [2]. He says that land may be given to a parson and his successors, and that when the parson dies the donor shall not enter; but there is no talk of the parson's corporateness. So again we may learn from Littleton's chapter on frankalmoin [3] that land may be given to a parson and his successors; but again there is no talk of the parson's corporateness.

There is, it is true, another passage in what at first sight looks like Littleton's text which seems to imply that a parson is a body politic, and Coke took occasion of this passage to explain that every corporation is either 'sole or aggregate of many,' and by so doing drew for future times one of the main outlines of our Law of Persons [4]. However, Butler has duly noted the fact that just the words that are important to us at the present moment are not in the earliest editions of the Tenures, and I believe that we should be very rash if we ascribed them to Littleton [5].

Still the most that I should claim for Broke would be that by applying the term 'corporation' to a parson, he suggested that a very large number of corporations sole existed in England, and so prepared the way for Coke's dogmatic classification of persons. Apparently for some little time past lawyers had occasionally spoken of the chantry priest as a corporation. So early as 1448 a writ is brought in the name of 'John Chaplain of the Chantry of B. Mary of Dale'; objection is taken to the omission of his surname; and to this it is replied that the name in which he sues may

[1] 39 Hen. VI, f. 13 (Mich. pl. 17).
[2] 7 Edw. IV, f. 12 (Trin. pl. 2).
[3] Lit. sec. 134.
[4] Lit. sec. 413; Co. Lit. 250 a. Other classical passages are Co. Lit. 2 a; *Sutton's Hospital* case, 10 Rep. 29 b.
[5] Littleton is telling us that no dying seised tolls an entry if the lands pass by 'succession.' He is supposed to add: 'Come de prelates, abbates, priours, deans, ou parson desglyse [ou dauter corps politike].' But the words that are here bracketed are not in the Cambridge MS.; nor in the edition by Lettou and Machlinia; nor in the Rouen edition; nor in Pynson's. On the other hand they stand in one, at least, of Redman's editions.

be that by which he is corporate[1]. Then it would appear that in 1482 Bryan C.J. and Choke J. supposed the existence of a corporation in a case in which an endowment was created for a single chantry priest. Fitzherbert, seemingly on the authority of an unprinted Year Book, represents them as saying that 'if the king grants me licence to make a chantry for a priest to sing in a certain place, and to give to him and his successors lands to the value of a certain sum, and I do this, that is a good corporation without further words[2].' Five years later some serjeants, if I understand them rightly, were condemning as void just such licences as those which Bryan and Catesby had discussed, and thereby were proposing to provide the lately crowned Henry VII with a rich crop of forfeitures. Keble opines that such a licence does not create a corporation (apparently because the king cannot delegate his corporation-making power), and further opines that the permission to give land to a corporation that does not already exist must be invalid[3]. Whether more came of this threat—for such it seems to be—I do not know[4]. Bullying the chantries was not a new practice in the days of Henry VII's son and grandson. In 1454 Romayn's Chantry, which had been confirmed by Edward III and Richard II, stood in need of a private Act of Parliament because a new generation of lawyers was not content with documents which had satisfied their less ingenious predecessors[5].

Now cases relating to endowed chantry priests were just the cases which might suggest an extension of the idea of corporateness beyond the sphere in which organized groups of men are active. Though in truth it was the law of mortmain, and not any law touching the creation of fictitious personality, which originally sent the founders of chantries to seek the king's licence, still the king was by this time using somewhat the same language about the single chantry priest that he had slowly learned to use about bodies of burgesses and others. The king, so the phrase went, was enabling the priest to hold land to himself and his successors. An investigation of licences for the formation of chantries might lead to some good results. At present, however, I cannot easily believe

[1] 27 Hen. VI, f. 3 (Mich. pl. 24): 'poet estre entendo que il est corporate par tiel nom.'

[2] Fitz. Abr. Graunt, pl. 30, citing T. 22 Edw. IV and M. 21 Edw. IV, 56. The earlier part of the case stands in Y. B. 21 Edw. IV, f. 55 (Mich. pl. 28). The case concerned the municipal corporation of Norwich, and the dictum must have been gratuitous.

[3] 2 Hen. VII, f. 13 (Hil. pl. 16).

[4] 20 Hen. VII, f. 7 (Mich. pl. 17): Rede J. seems to say that such a licence would make a corporation.

[5] Rot. Parl. v. 258. It had been supposed for a hundred and twenty years that there had been a chantry sufficiently founded in law and to have stood stable in perpetuity 'which for certain diminution of the form of making used in the law at these days is not held sufficient.'

that, even when the doom of the chantries was not far distant, English lawyers were agreed that the king could make, and sometimes did make, a corporation out of a single man or out of that man's official character. So late as the year 1522, the year after Richard Broke took his degree at Oxford, Fineux, C. J. B. R., was, if I catch the sense of his words, declaring that a corporation sole would be an absurdity, a nonentity. 'It is argued,' he said, 'that the Master and his Brethren cannot make a gift to the Master, since he is the head of the corporation. Therefore let us see what a corporation is and what kinds of corporations there are. A corporation is an aggregation of head and body: not a head by itself, nor a body by itself; and it must be consonant to reason, for otherwise it is worth nought. For albeit the king desires to make a corporation of J. S., that is not good, for common reason tells us that it is not a permanent thing and cannot have successors[1].' The Chief Justice goes on to speak of the Parliament of King, Lords, and Commons as a corporation by the common law. He seems to find the essence of corporateness in the permanent existence of the organized group, the 'body' of 'members,' which remains the same body though its particles change, and he denies that this phenomenon can exist where only one man is concerned. There is no permanence. The man dies and, if there is office or benefice in the case, he will have no successor until time has elapsed and a successor has been appointed. That is what had made the parson's case a difficult case for English lawyers. Fineux was against feigning corporateness where none really existed. At any rate, a good deal of his judgment seems incompatible with the supposition that 'corporation sole' was in 1522 a term in current use.

That term would never have made its fortune had it not been applied to a class much wider and much less exposed to destructive criticism than was the class of permanently endowed chantry priests. That in all the Year Books a parochial rector is never called a corporation I certainly dare not say. Still, as a note at the end of this paper may serve to show, I have unsuccessfully sought the word in a large number of places where it seemed likely to be found if ever it was to be found at all. Such places are by no means rare. Not unfrequently the courts were compelled to consider what a parson could do and could not do, what

[1] 14 Hen. VIII, f. 3 (Mich. pl. 2): 'Car coment que le roy veut faire corporacion a J. S. ceo n'est bon, pur ceo que comon reson dit que n'est chose permanente et ne peut aver successor.' Considering the context, I do not think that I translate this unfairly, though the words 'faire corporacion a J. S.' may not be exactly rendered or renderable. The king, we may say, cannot make a corporation which shall have J. S. for its basis. ['Grant to J. S. to be a corporation' seems the most plausible version.—Ed.]

leases he could grant, what charges he could create, what sort of estate he had in his glebe. Even in Coke's time what we may call the theoretical construction of the parson's relation to the glebe had hardly ceased to be matter of debate. 'In whom the fee simple of the glebe is,' said the great dogmatist, 'is a question in our books[1].' Over the glebe, over the parson's freehold, the parson's fee, the parson's power of burdening his church or his successors with pensions or annuities, there had been a great deal of controversy; but I cannot find that into this controversy the term 'corporation' was introduced before the days of Richard Broke.

If now we turn from the phrase to the legal phenomena which it is supposed to describe, we must look for them in the ecclesiastical sphere. Coke knew two corporations sole that were not ecclesiastical, and I cannot find that he knew more. They were a strange pair: the king[2] and the chamberlain of the city of London[3]. As to the civic officer, a case from 1468 shows us a chamberlain suing on a bond given to a previous chamberlain 'and his successors.' The lawyers who take part in the argument say nothing of any corporation sole, and seem to think that obligations could be created in favour of the Treasurer of England and his successors or the Chief Justice and his successors[4]. As to the king, I strongly suspect that Coke himself was living when men first called the king a corporation sole, though many had called him the head of a corporation. But of this at another time. The centre of sole corporateness, if we may so speak, obviously lies among ecclesiastical institutions. If there are any, there are thousands of corporations sole within the province of church property law.

But further, we must concentrate our attention upon the parish parson. We may find the Elizabethan and Jacobean lawyers applying the new term to bishops, deans, and prebendaries; also retrospectively to abbots and priors. Their cases, however, differed in what had been a most important respect from the case of the parochial rector. They were members, in most instances they were heads, of corporations aggregate. As is well known, a disintegrating process had long been at work within the ecclesiastical groups, more especially within the cathedral groups[5]. Already when the Year Books begin their tale this process had gone far. The bishop has lands that are severed from the lands of the cathedral chapter or cathedral monastery; the dean has lands, the prebendary has lands or other sources of revenue. These partitions have ceased

[1] Co. Lit. 340 b, 341 a.
[2] *Sutton's Hospital* case, 10 Rep. 29 b.
[3] *Fulwood's* case, 4 Rep. 65 a.
[4] 8 Edw. IV, f. 18 (Mich. pl. 29).
[5] Lib. Ass. f. 117, ann. 25, pl. 8: 'All the cathedral churches and their possessions were at one time a gross.'

to be merely matters of internal economy; they have an external validity which the temporal courts recognize[1]. Still, throughout the Middle Ages it is never forgotten that the bishop who as bishop holds lands severed from the lands of the chapter or the convent holds those lands as head of a corporation of which canons or monks are members. This is of great theoretical importance, for it obviates a difficulty which our lawyers have to meet when they consider the situation of the parochial rector. In the case of the bishop a permanent 'body' exists in which the ownership, the full fee simple, of lands can be reposed. 'For,' as Littleton says, 'a bishop may have a writ of right of the tenements of the right of his church, for that the right is in his chapter, and the fee simple abideth in him and in his chapter[2].' The application of the term 'corporation sole' to bishops, deans, and prebendaries marked the end of the long disintegrating process, and did some harm to our legal theories. If the episcopal lands belong to the bishop as a 'corporation sole,' why, we may ask, does he require the consent of the chapter if he is to alienate them? The 'enabling statute' of Henry VIII and the 'disabling statutes' of Elizabeth deprived this question of most of its practical importance. Thenceforward in the way of grants or leases the bishop could do little with that he could not do without the chapter's consent[3]. It is also to be remembered that an abbot's powers were exceedingly large; he ruled over a body of men who were dead in the law, and the property of his 'house' or 'church' was very much like his own property. Even if without the chapter's consent he alienated land, he was regarded, at least by the temporal courts, much rather as one who was attempting to wrong his successors than as one who was wronging that body of 'incapables' of which he was the head. It is to be remembered also that in England many of the cathedrals were monastic. This gave our medieval lawyers some thoughts about the heads of corporations aggregate and about the powerlessness of headless bodies which seem strange to us. A man might easily slip from the statement that the abbey is a corporation into the statement that the abbot is a corporation, and I am far from saying that the latter phrase was never used so long as England had abbots in it[4]; but, so far as I can see, the 'corpora-

[1] For instance, *Chapter* v. *Dean of Lincoln*, 9 Edw. III, f. 18 (Trin. pl. 3) and f. 33 (Mich. pl. 33).

[2] Litt. sec. 645. 6 Edw. III, f. 10, 11 (Hil. pl. 28), it is said in argument, 'The right of the church [of York] abides rather in the dean and chapter than in the archbishop, car ceo ne mourt pas.' This case is continued in 6 Edw. III, f. 50 (Mich. pl. 50).

[3] See Coke's exposition, Co. Lit. 44 a, ff; and Blackstone's, 2 Com. 319.

[4] Apparently in 1487 (3 Hen. VII, f 11, Mich. pl. 1), Vavasor J. said 'chescun abbe est corps politique, car il ne poet rien prendre forsque al use del Meason.'

tion sole' makes its entry into the cathedral along with the royal supremacy and other novelties. Our interest lies in the parish church [1].

Of the parish church there is a long story to be told. Dr. Stutz is telling it in a most interesting manner [2]. Our own Selden, however, was on the true track; he knew that the patron had once been more than a patron [3], and we need go no further than Blackstone's Commentaries to learn that Alexander III did something memorable in this matter [4]. To be brief: in the twelfth century we may regard the patron as one who has been the owner of church and glebe and tithe, but an owner from whom ecclesiastical law has gradually been sucking his ownership. It has been insisting with varying success that he is not to make such profit out of his church as his heathen ancestor would have made out of a god-house. He must demise the church and an appurtenant manse to an ordained clerk approved by the bishop. The ecclesiastical 'benefice' is the old Frankish *beneficium*, the old land-loan of which we read in all histories of feudalism [5]. In the eleventh century occurred the world-shaking quarrel about investitures. Emperors and princes had been endeavouring to treat even ancient cathedrals as their 'owned churches.' It was over the investiture of bishops that the main struggle took place; nevertheless, the principle which the Hildebrandine papacy asserted was the broad principle, 'No investiture by the lay hand.' Slowly in the twelfth century, when the more famous dispute had been settled, the new rule was made good by constant pressure against the patrons or owners of the ordinary churches. Then a great lawyer, Alexander III (1159–81), succeeded, so we are told, in finding a new 'juristic basis' for that right of selecting a clerk which could not be taken away from the patron. That right was to be conceived no longer as an offshoot of ownership, but as an outcome of the Church's gratitude towards

[1] Is the idea of the incapacity of a headless corporation capable of doing harm at the present day? Grant, Corporations, 110, says that 'if a master of a college devise lands to the college, they cannot take, because at the moment of his death they are an incomplete body.' His latest authority is Dalison, 31. In 1863 Dr. Whewell or his legal adviser was careful about this matter. A devise was made 'unto the Master, Fellows, and Scholars of Trinity College aforesaid and their successors for ever, or, in case that devise would fail of effect in consequence of there being no Master of the said College at my death, then to the persons who shall be the Senior Fellows of the said College at my decease and their heirs until the appointment of a Master of such College, and from and after such appointment (being within twenty-one years after my death) to the Master, Fellows, and Scholars of the said College and their successors for ever.' Thus international law was endowed while homage was paid to the law of England. But perhaps I do wrong in attracting attention to a rule that should be, if it is not, obsolete.

[2] Ulrich Stutz, Geschichte des kirchlichen Benefizialwesens. Only the first part has yet appeared, but Dr. Stutz sketched his programme in Die Eigenkirche, Berlin, 1895.

[3] History of Tithes, c. 12.

[4] 2 Bl. Com. 23.

[5] Stutz, Lehen und Pfründe, Zeitschrift der Savigny-Stiftung, Germ. Abt. xx. 213.

a pious founder. Thus was laid the groundwork of the classical law of the Catholic Church about the *ius patronatus*; and, as Dr. Stutz says, the Church was left free to show itself less and less grateful as time went on.

One part of Pope Alexander's scheme took no effect in England. Investiture by the lay hand could be suppressed. The parson was to be instituted and inducted by his ecclesiastical superiors. Thus his rights in church and glebe and tithe would no longer appear as rights derived out of the patron's ownership, and the patron's rights, if they were to be conceived—and in England they certainly would be conceived—as rights of a proprietary kind, would be rights in an incorporeal thing, an 'objectified' advowson. But with successful tenacity Henry II and his successors asserted on behalf of the temporal forum no merely concurrent, but an absolutely exclusive jurisdiction over all disputes, whether possessory or petitory, that touched the advowson. One consequence of this most important assertion was that the English law about this matter strayed away from the jurisprudence of the Catholic Church. If we compare what we have learned as the old English law of advowsons with the *ius commune* of the Catholic Church as it is stated by Dr. Hinschius we shall see remarkable differences, and in all cases it is the law of England that is the more favourable to patronage [1]. Also in England we read of survivals which tell us that the old notion of the patron's ownership of the church died hard [2].

But here we are speaking of persons. If the patron is not, who then is the owner of the church and glebe? The canonist will 'subjectify' the church. The church (subject) owns the church (object). Thus he obtains temporary relief [3]. There remains the question how this owning church is to be conceived; and a trouble-

[1] Kirchenrecht, vol. iii. p. 1 ff. In particular, English law regards patronage as normal. When the ordinary freely chooses the clerk, this is regarded as an exercise of patronage; and so we come by the idea of a 'collative advowson.' On the other hand, the catholic canonist should, so I understand, look upon patronage as abnormal, should say that when the bishop selects a clerk this is an exercise not of patronage but of 'jurisdiction,' and should add that the case in which a bishop as bishop is patron of a benefice within his own diocese, though not impossible, is extremely rare (Hinschius, op. cit. pp. 35–7). To a king who was going to exercise the 'patronage' annexed to vacant bishoprics, but could not claim spiritual jurisdiction, this difference was of high importance.

[2] See Pike, Feoffment and Livery of Incorporeal Hereditaments, Law Quarterly Review, v. 29, 35 ff. 43 Edw. III, f. 1 (Hil. pl. 4): advowson conveyed by feoffment at church door. 7 Edw. III, f. 5 (Hil. pl. 7): Herle's dictum that not long ago men did not know what an advowson was, but granted churches. 11 Hen. VI, f. 4 (Mich. pl. 8): per Martin, an advowson will pass by livery, and in a writ of right of advowson the summons must be made upon the glebe. 38 Edw. III, f. 4 (scire facias): per Finchden, perhaps in old time the law was that patron without parson could charge the glebe. 9 Hen. VI, f. 52 (Mich. pl. 35): the advowson of a church is assets, for it is an advantage to advance one's blood or one's friend. 5 Hen. VII, f. 37 (Trin. pl. 3): per Vavasour and Danvers, an advowson lies in tenure, and one may distrain [for the services] in the churchyard.

[3] See Gierke, Genossenschaftsrecht, vol. iii. passim.

some question it is. What is the relation of the *ecclesia particularis* (church of Ely or of Trumpington) to the universal church? Are we to think of a *persona ficta*, or of a patron saint, or of the Bride of Christ, or of that vast corporation aggregate the *congregatio omnium fidelium*, or of Christ's vicar at Rome, or of Christ's poor throughout the world; or shall we say that walls are capable of retaining possession? Mystical theories break down: persons who can never be in the wrong are useless in a court of law. Much might be and much was written about these matters, and we may observe that the extreme theory which places the ownership of all church property in the pope was taught by at least one English canonist[1]. Within or behind a subjectified church lay problems which English lawyers might well endeavour to avoid.

On the whole it seems to me that a church is no person in the English temporal law of the later Middle Ages. I do not mean that our lawyers maintain one consistent strain of language. That is not so. They occasionally feel the attraction of a system which would make the parson a guardian or curator of an ideal ward. *Ecclesia fungitur vice minoris* is sometimes on their lips[2]. The thought that the 'parson' of a church was or bore the 'person' of the church was probably less distant from them than it is from us, for the two words long remained one word for the eye and for the ear. Coke, in a theoretical moment, can teach that in the person of the parson the church may sue for and maintain 'her' right[3]. Again, it seems that conveyances were sometimes made to a parish church without mention of the parson[4], and when an action for land is brought against a rector he will sometimes say, 'I found my church seised of this land, and therefore pray aid of patron and ordinary[4].'

We may, however, remember at this point that in modern judgments and in Acts of Parliament lands are often spoken of as belonging to 'a charity.' Still, our books do not teach us that charities are persons. Lands that belong to a charity are owned, if not by a corporation, then by some man or men. Now we must not press this analogy between medieval churches and modern charities very far, for medieval lawyers were but slowly elaborating that idea of a trust which bears heavy weights in modern times and enables all religious bodies, except one old-fashioned body, to conduct their affairs conveniently enough without an apparatus of corporations sole. Still, in the main, church and charity seem alike. Neither ever sues, neither is ever sued.

[1] J. de Athon (ed. 1679), p. 76, gl. ad v. *summorum pontificum*.
[2] Pollock and Maitland, Hist. Eng. Law, ed. 2, i. 503.
[3] Co. Lit. 300 b.
[4] 11 Hen. IV, *f.* 84 (Trin. pl. 34). But see 8 Hen. V, f. 4 (Hil. pl. 15).

The parson holds land 'in right of his church.' So the king can hold land or claim a wardship or a presentation, sometimes 'in right of his crown,' but sometimes 'in right of' an escheated honour or a vacant bishopric. So too medieval lawyers were learning to say that an executor will own some goods in his own right and others *en auter droit*.

The failure of the church to become a person for English temporal lawyers is best seen in a rule of law which can be traced from Bracton's day to Coke's through the length of the Year Books. A bishop or an abbot can bring a writ of right, a parson cannot. The parson requires a special action, the *iurata utrum*; it is a *singulare beneficium*[1] provided to suit his peculiar needs. The difficulty that had to be met was this:—You can conceive ownership, a full fee simple, vested in a man 'and his heirs,' or in an organized body of men such as a bishop and chapter, or abbot and convent, but you cannot conceive it reposing in the series, the intermittent series, of parsons. True, that the *iurata utrum* will be set to inquire whether a field belongs (*pertinet*) to the plaintiff's 'church.' But the necessity for a special action shows us that the *pertinet* of the writ is thought of as the *pertinet* of appurtenancy, and not as the *pertinet* of ownership. As a garden belongs to a house, as a stopper belongs to a bottle, not as house and bottle belong to a man, so the glebe belongs to the church.

If we have to think of 'subjectification,' we have to think of 'objectification' also. Some highly complex 'things' were made by medieval habit and perceived by medieval law. One such thing was the manor; another such thing was the church. Our pious ancestors talked of their churches much as they talked of their manors. They took esplees of the one and esplees of the other; they exploited the manor and exploited the church. True, that the total sum of right, valuable right, of which the church was the object might generally be split between parson, patron, and ordinary. Usually the claimant of an advowson would have to say that the necessary exploitation of the church had been performed, not by himself, but by his presentee. But let us suppose the church impropriated by a religious house, and listen to the head of that house declaring how to his own proper use he has taken esplees in oblations and obventions, great tithes, small tithes, and other manner of tithes[2]. Or let us see him letting a church to farm for a term of years at an annual rent[3]. The church was in many contexts a complex thing, and by no means *extra commercium*. I doubt if it is generally known how much was done in the way of

[1] Bracton, f. 286 b.

[2] 5 Edw. III, f. 18 (Pasch. pl. 18).

[3] 9 Hen. V, f. 8 (Mich. pl. 1).

charging 'churches' with annuities or pensions in the days of Catholicism. On an average every year seems to produce one law suit that is worthy to be reported and has its origin in this practice. In the Year Books the church's objectivity as the core of an exploitable and enjoyable mass of wealth is, to say the least, far more prominent than its subjectivity [1].

'If,' said Rolfe Serj., in 1421, 'a man gives or devises land to God and the church of St. Peter of Westminster, his gift is good, for the church is not the house nor the walls, but is to be understood as the *ecclesia spiritualis*, to wit, the abbot and convent, and because the abbot and convent can receive a gift, the gift is good . . . but a parish church can only be understood as a house made of stones and walls and roof which cannot take a gift or feoffment [2].'

We observe that God and St. Peter are impracticable feoffees, and that the learned serjeant's 'spiritual church' is a body of men at Westminster. It seems to me that throughout the Middle Ages there was far more doubt than we should expect to find as to the validity of a gift made to 'the [parish] church of *X*,' or to 'the parson of *X* and his successors,' and that Broke was not performing a needless task when he vouched Littleton and Danby to warrant a gift that took the latter of these forms. Not much land was, I take it, being conveyed to parish churches or parish parsons, while for the old glebe the parson could have shown no title deeds. It had been acquired at a remote time by a slow expropriation of the patron.

The patron's claim upon it was never quite forgotten. Unless I have misread the books, a tendency to speak of the church as a person grows much weaker as time goes on. There is more of it in Bracton than in Littleton or Fitzherbert [3]. English lawyers were no longer learning from civilians and canonists, and were con-

[1] Sometimes the thing that is let to farm is called, not the church, but the rectory. This, however, does not mean merely the rectory house. 21 Hen. VII, f. 21 (Pasch. pl. 11): 'The church, the churchyard, and the tithe make the rectory, and under the name of rectory they pass by parol.' See *Greenslade* v. *Darby*, L. R. 3 Q. B. 421: The lay impropriator's right to the herbage of the churchyard maintained against a perpetual curate: a learned judgment by Blackburn J. See also Lyndwood, Provinciale, pp. 154 *ff*, as to the practice of letting churches. 30 Edw. III, f. 1: Action of account against bailiff of the plaintiff's church; unsuccessful objection that defendant should be called bailiff, not of the church, but of a rectory: car esglise est a les parochiens, et nemy le soen [the parson's]. This is the only instance that I have noticed in the Year Books of any phrase which would seem to attribute to the parishioners any sort of proprietary right in the church.

[2] 8 Hen. V, f. 4 (Hil. pl. 15). I omit some words expressing the often recurring theory that the conventual church cannot accept a gift made when there is no abbot. Headless bodies cannot act, but they can retain a right.

[3] 21 Edw. IV, f. 61 (Mich. pl. 32): per Pigot, fines were formerly received which purported to convey *Deo et ecclesiae*, but the judges of those days were ignorant of the law. 9 Hen. VII, f. 11 (Mich. pl. 6): conveyances to God and the church are still held valid if made in old time; they would not be valid if made at the present day.

structing their grand scheme of estates in land. It is with their heads full of 'estates' that they approach the problem of the glebe, and difficult they find it. At least with the consent of patron and ordinary, the parson can do much that a tenant for life cannot do [1]; and, on the other hand, he cannot do all that can be done by a tenant in fee simple. It is hard to find a niche for the rector in our system of tenancies. But let us observe that this difficulty only exists for men who are not going to personify churches or offices.

There is an interesting discussion in 1430[2]. The plaintiff's ancestor had recovered land from a parson, the predecessor of the defendant, by writ of *Cessavit*; he now sues by *Scire facias*, and the defendant prays aid of the patron; the question is whether the aid prayer is to be allowed.

Cottesmore J. says:—

'I know well that a parson has only an estate for the term of his life; and it may be that the plaintiff after the judgment released to the patron, and such a release would be good enough, for the reversion of the church is in him [the patron], and this release the parson cannot plead unless he has aid. And I put the case that a man holds land of me for the term of his life, the reversion being in me; then if one who has right in the land releases to me who am in reversion, is not that release good? So in this case.'

Paston J. takes the contrary view:—

'I learnt for law that if *Praecipe quod reddat* is brought against an abbot or a parson, they shall never have aid, for they have a fee simple in the land, for the land is given to them and their successors, so that no reversion is reserved upon the gift. . . . If a writ of right is brought against them they shall join the mise upon the *mere droit*, and that proves that they have a better estate than for term of life. And I have never seen an estate for life with the reversion in no one; for if the parson dies the freehold of the glebe is not in the patron, and no writ for that land is maintainable against any one until there is another parson. So it seems to me that aid should not be granted.'

Then speaks Babington C. J., and, having put an ingenious case in which, so he says, there is a life estate without a reversion, he proceeds to distinguish the case of the abbot from that of the parson:—

'When an abbot dies seised the freehold always remains in the

[1] Even without the active concurrence of patron and ordinary, who perhaps would make default when prayed in aid, the parson could do a good deal in the way of diminishing his successor's revenue by suffering collusive actions. See e. g. 4 Hen. VII, f. 2 (Hil. fol. 4), where the justices in Cam. Scac. were divided, four against three.

[2] 8 Hen. VI, f. 24 (Hil. pl. 10).

house (*meason*) and the house cannot be void . . . but if a parson dies, then the church is empty and the freehold in right is in the patron, notwithstanding that the patron can take no advantage of the land; and if a recovery were good when the patron was not made party, then the patronage would be diminished, which would be against reason. So it seems to me that [the defendant] shall have aid.'

Two other judges, Strangways and Martin, are against the aid prayer; Martin rejects the theory that the parson is tenant for life, and brings into the discussion a tenant in tail after possibility of issue extinct. On the whole the case is unfavourable to the theory which would make the parson tenant for life and the patron reversioner, but that this theory was held in 1430 by a Chief Justice of the Common Pleas seems plain and is very remarkable. The weak point in the doctrine is the admission that the patron does not take the profits of the vacant church. These, it seems settled, go to the ordinary [1], so that the patron's 'reversion' (if any) looks like a very nude right. But the Chief Justice's refusal to repose a right in an empty 'church,' while he will place one in a 'house' that has some monks in it, should not escape attention.

Nearly a century later, in 1520, a somewhat similar case came before the court [2], and we still see the same diversity of opinion. Broke J. (not Broke of the Abridgement) said that the parson had the fee simple of the glebe *in iure ecclesiae*.

'It seems to me,' said Pollard J., 'that the fee simple is in the patron; for [the parson] has no inheritance in the benefice and the fee cannot be in suspense, and it must be in the patron, for the ordinary only has power to admit a clerk. And although all parsons are made by the act of the ordinary, there is nothing in the case that can properly be called succession. For if land be given to a parson and his successor, that is not good, for he [the parson] has no capacity to take this; but if land be given *Priori et Ecclesiae* that is good, because there is a corporation. . . . And if the parson creates a charge, that will be good only so long as he is parson, for if he dies or resigns, his successor shall hold the land discharged; and this proves that the parson has not the fee simple. But if in time of vacation patron and ordinary charge the land, the successor shall hold it charged, for they [patron and ordinary] had at the time the whole interest [3].'

Eliot J. then started a middle opinion:—

'It seems to me that the parson has the fee *in iure ecclesiae*, and

[1] 11 Hen. VI, f. 4 (Mich. pl. 8): per Danby, the ordinary shall have the occupation and all the profit. 9 Hen. V, f. 14 (Mich. pl. 19) accord. See Stat. 28 Hen. VIII, c. 11, which gives the profits to the succeeding parson.

[2] 12 Hen. VIII, f. 7 (Mich. pl. 1).

[3] Apparently Belknap J. had said that such a charge would be good: Fitz. Abr. Annuitie, pl. 53 (8 Ric. II).

not the patron—as one is seised in fee *in iure uxoris suae*—and yet for some purposes he is only tenant for life. So tenant in tail has a fee tail, and yet he has only for the term of his life, for if he makes a lease or grants a rent charge, that will be only for the term of his life. . . . As to what my brother Pollard says, namely, that in time of vacation patron and ordinary can create a charge, that is not so.'

Then Brudenel C. J. was certain that the parson has a fee simple :—

'He has a fee simple by succession, as an heir [has one] by inheritance, and neither the ordinary nor the patron gives this to the parson.'

Pollard's opinion was belated; but we observe that on the eve of the Reformation it was still possible for an English judge to hold that the ownership, the fee simple, of the church is in the patron. And at this point it will not be impertinent to remember that even at the present day timber felled on the glebe is said to belong to the patron [1].

In the interval between these two cases Littleton had written. He rejected the theory which would place the fee simple in the patron; but he also rejected that which would place it in the parson. Of any theory which would subjectify the church or the parson's office or dignity he said nothing; and nothing of any corporation sole. Let us follow his argument.

He is discussing 'discontinuance' and has to start with this, that if a parson or vicar grants land which is of the right of his church and then dies or resigns, his successor may enter [2]. In other words, there has been no discontinuance. 'And,' he says, 'I take the cause to be for that the parson or vicar that is seised as in right of his church hath no right of the fee simple in the tenements, and the right of the fee simple doth not [3] abide in another person.' That, he explains, is the difference between the case of the parson and the case of a bishop, abbot, dean, or master of a hospital; their alienations may be discontinuances, his cannot; 'for a bishop may have a writ of right of the tenements of the right of the church, for that the right is in his chapter, and the fee simple abideth in him and his chapter. . . . And a master of a hospital may have a writ of right because the right remaineth in him and in his *confreres*, &c.; and so in other like cases. But a parson or vicar cannot have

[1] *Sowerby* v. *Fryer* (1869), L. R. 8 Eq. 417, 423: James V. C.: 'I never could understand why a vicar who has wrongfully cut timber should not be called to account for the proceeds after he has turned it into money, in order that they may be invested for the benefit of the advowson; *it being conceded that the patron is entitled to the specific timber.*'

[2] Litt. sec. 643.

[3] There are various readings, but the argument seems plainly to require this 'not.'

a writ of right, &c.' A discontinuance, if I rightly understand the matter, involves the alienation of that in which the alienor has some right, but some right is vested in another person. In the one case the bishop alienates what belongs to him and his chapter; in the other case the parson alienates what belongs to no one else.

Then we are told [1] that the highest writ that a parson or vicar can have is the *Utrum*, and that this 'is a great proof that the right of fee is not in them, nor in others. But the right of the fee simple is in abeyance; that is to say, that it is only in the remembrance, intendment, and consideration of law, for it seemeth to me that such a thing and such a right which is said in divers books to be in abeyance is as much as to say in Latin, Talis res, vel tale rectum, quae vel quod non est in homine adtunc superstite, sed tantummodo est et consistit in consideratione et intelligentia legis, et, quod alii dixerunt, talem rem aut tale rectum fore in nubibus.' Yes, rather than have any dealings with fictitious persons, subjectified churches, personified dignities, corporations that are not bodies, we will have a subjectless right, a fee simple in the clouds [2].

Then in a very curious section Littleton [3] has to face the fact that the parson with the assent of patron and ordinary can charge the glebe of the parsonage perpetually. Thence, so he says, some will argue that these three persons, or two or one of them, must have a fee simple. Littleton must answer this argument. Now this is one of those points at which a little fiction might give us temporary relief. We might place the fee simple in a fictitious person, whose lawfully appointed guardians give a charge on the property of their imaginary ward. We might refer to the case of a town council which sets the common seal to a conveyance of land which belongs to the town. But, rather than do anything of the kind, Littleton has recourse to a wholly different principle.

The charge has been granted by parson, patron, and ordinary, and then the parson dies. His successor cannot come to the church but by the presentment of the patron and institution of the ordinary, 'and for this cause he ought to hold himself content and agree to that which his patron and the ordinary have lawfully done before.' In other words, the parson is debarred by decency and gratitude from examining the mouth of the gift horse. No one compelled him to accept the benefice. Perhaps we might say that by his own act he is estopped from quarrelling with the past acts of his benefactors. Such a piece of reasoning would surely be impossible to

[1] Lit. sec. 646.

[2] Apparently the talk about a fee simple *in nubibus* began in debates over contingent remainders: 11 Hen. IV, f. 74 (Trin. pl. 14).

[3] Lit. sec. 648.

any one who thought of the church or the rector's office as a person capable of sustaining proprietary rights.

Before Littleton's Tenures came to Coke's hands, Broke or some one else had started the suggestion that a parson was a corporation, or might be likened to a corporation. Apparently that suggestion was first offered by way of explaining how it came about that a gift could be made to a parson and his successors. Now it seems to me that a speculative jurist might have taken advantage of this phrase in order to reconstruct the theory of the parson's relation to the glebe. He might have said that in this case, as in the case of the corporation aggregate, we have a *persona ficta*, an ideal subject of rights, in which a fee simple may repose; that the affairs of this person are administered by a single man, in the same way in which the affairs of certain other fictitious persons are administered by groups of men; and that the rector therefore must be conceived not as a proprietor but as a guardian, though his powers of administration are large, and may often be used for his own advantage. And Coke, in his more speculative moments, showed some inclination to tread this path. Especially is this the case when he contrasts 'persons natural created of God, as J. S., J. N., &c., and persons incorporate and politic created by the policy of man,' and then adds that the latter are 'of two sorts, viz. aggregate or sole [1].' But to carry that theory through would have necessitated a breach with traditional ideas of the parson's estate and a distinct declaration that Littleton's way of thinking had become antiquated [2]. As it is, when the critical point is reached and we are perhaps hoping that the new-found corporation sole will be of some real use, we see that it gives and can give Coke no help at all, for, after all, Coke's corporation sole is a man: a man who fills an office and can hold land 'to himself and his successors,' but a mortal man.

When that man dies the freehold is in abeyance. Littleton had said that this happened 'if a parson of a church dieth.' Coke adds [3]: 'So it is of a bishop, abbot, dean, archdeacon, prebend, vicar, and of every other sole corporation or body politic, presentative, elective, or donative, which inheritances put in abeyance are by some called *haereditates iacentes*.' So here we catch our corporation sole *in articulo mortis*. If God did not create him, then neither the inferior not yet the superior clergy are God's creatures.

So much as to the state of affairs when there is no parson: the freehold is in abeyance, and 'the fee and right is in abeyance.' On the other hand, when there is a parson then, says Coke [4], 'for the

[1] Co. Litt. 2 a.

[2] In *Wythers* v. *Iseham*, Dyer, f. 70 (pl. 43), the case of the parson had been noticed as the only exception to the rule that the freehold could not be in abeyance.

[3] Co. Litt. 342 b.

[4] Ibid. 341 a.

benefit of the church and of his successor he is in some cases esteemed in law to have a fee qualified; but, to do anything to the prejudice of his successor, in many cases the law adjudgeth him to have in effect but an estate for life.' And again, 'It is evident that to many purposes a parson hath but in effect an estate for life, and to many a qualified fee simple, but the entire fee and right is not in him.'

This account of the matter seems to have been accepted as final. Just at this time the Elizabethan statutes were giving a new complexion to the practical law. The parson, even with the consent of patron and ordinary, could no longer alienate or charge the glebe, and had only a modest power of granting leases. Moreover, as the old real actions gave place to the action of ejectment, a great deal of the old learning fell into oblivion. Lawyers had no longer to discuss the parson's aid prayer or his ability or inability to join the mise on the *mere droit*, and it was around such topics as these that the old indecisive battles had been fought. Coke's theory, though it might not be neat, was flexible: for some purposes the parson has an estate for life, for others a qualified fee. And is not this the orthodoxy of the present day? The abeyance of the freehold during the vacancy of the benefice has the approval of Mr. Challis[1]; the 'fee simple qualified' appears in Sir H. Elphinstone's edition of Mr. Goodeve's book[2].

Thus, so it seems to me, our corporation sole refuses to perform just the first service that we should require at the hands of any reasonably useful *persona ficta*. He or it refuses to act as the bearer of a right which threatens to fall into abeyance or dissipate itself among the clouds for want of a 'natural' custodian. I say 'he or it'; but which ought we to say? Is a beneficed clergyman—for instance, the Rev. John Styles—a corporation sole, or is he merely the administrator or representative of a corporation sole? Our Statute Book is not very consistent. When it was decreeing the Disestablishment of the Irish Church it declared that on January 1, 1871, every ecclesiastical corporation in Ireland, whether sole or aggregate, should be dissolved[3], and it were needless to say that this edict did not contemplate a summary dissolution of worthy divines. But turn to a carefully worded Statute of Limitations. 'It shall be lawful for any archbishop, bishop, dean, prebendary, parson, master of a hospital, or other spiritual or eleemosynary corporation sole to make an entry or

[1] Challis, Real Property, ed. 2, p. 91.
[2] Goodeve, Real Property, ed. 4, pp. 85, 133. See the remarks of Jessel M. R. in *Mulliner* v. *Midland Railway Co.*, 11 Ch. D. 622.
[3] 32 & 33 Vict. c. 42, sec. 13.

distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which *the right of such corporation sole or of his predecessor* . . . shall have first accrued[1].' Unquestionably for the draftsman of this section the corporation sole was, as he was for Coke, a man, a mortal man.

If our corporation sole really were an artificial person created by the policy of man we ought to marvel at its incompetence. Unless custom or statute aids it, it cannot (so we are told) own a chattel, not even a chattel real[2]. A different and an equally inelegant device was adopted to provide an owning 'subject' for the ornaments of the church and the minister thereof—adopted at the end of the Middle Ages by lawyers who held themselves debarred by the theory of corporations from frankly saying that the body of parishioners is a corporation aggregate. And then we are also told that in all probability a corporation sole 'cannot enter into a contract except with statutory authority or as incidental to an interest in land[3].' What then can this miserable being do? It cannot even hold its glebe tenaciously enough to prevent the freehold falling into abeyance whenever a parson dies.

When we turn from this mere ghost of a fiction to a true corporation, a corporation aggregate, surely the main phenomenon that requires explanation, that sets us talking of personality and, it may be, of fictitious personality, is this, that we can conceive and do conceive that legal transactions, or acts in the law, can take place and do often take place between the corporation of the one part and some or all of the corporators of the other part. A beautiful modern example[4] shows us eight men conveying a colliery to a company of which they are the only members; and the Court of Appeal construes this as a 'sale' by eight persons to a ninth person, though the price consists not in cash, but in the whole share capital of the newly formed corporation. But to all appearance there can be no legal transaction, no act in the law, between the corporation sole and the natural man who is the one and only corporator. We are told, for example, that 'a sole corporation, as a bishop or a parson, cannot make a lease to himself, because he cannot be both lessor and lessee[5].' We are told that 'if a bishop hath lands in both capacities he cannot give or take to or from himself[6].' Those who use such phrases as these show plainly

[1] 3 & 4 Will. IV, c. 27, sec. 29.
[2] *Fulwood's* case, 4 Rep. 65 a; *Arundel's* case, Hob. 64.
[3] Pollock, Contract, ed. 6, p. 109. The principal modern authority is *Howley* v. *Knight*, 14 Q. B. 240.
[4] *Foster & Son, Lim.* v. *Com. of Inland Rev.* [1894] 1 Q. B. 516.
[5] *Salter* v. *Grosvenor*, 8 Mod. 303, 304.
[6] *Wood* v. *Mayor, &c., of London*, Salk. 396, 398. See also Grant, Corporations, 635.

enough that in their opinion there is no second 'person' involved in the cases of which they speak: 'he' is 'himself,' and there is an end of the matter [1]. I can find no case in which the natural man has sued the corporation sole or the corporation sole has sued the natural man.

When a man is executor, administrator, trustee, bailee, or agent, we do not feel it necessary to speak of corporateness or artificial personality, and I fail to see why we should do this when a man is a beneficed clerk. Whatever the Romans may have done—and about this there have been disputes enough—we have made no person of the *hereditas iacens*. On an intestate's death we stopped the gap with no figment, but with a real live bishop, and in later days with the Judge of the Probate Court: English law has liked its persons to be real. Our only excuse for making a fuss over the parson is that, owing to the slow expropriation of the patron, the parson has an estate in church and glebe which refuses to fit into any of the ordinary categories of our real property law; but, as we have already seen, our talk of corporations sole has failed to solve or even to evade the difficulty. No one at the present day would dream of introducing for the first time the scheme of church property law that has come down to us, and I think it not rash to predict that, whether the Church of England remains established or no, churches and glebes will some day find their owners in a corporation aggregate or in many corporations aggregate [2]. Be that as it may, the ecclesiastical corporation sole is no 'juristic person'; he or it is either natural man or juristic abortion.

The worst of his or its doings we have not yet considered. He or it has persuaded us to think clumsy thoughts or to speak clumsy words about King and Commonwealth [3].

F. W. MAITLAND.

[1] The matter was well stated by Broke J. in 14 Hen. VIII, f. 30 (Pasch. pl. 8): a parson cannot grant unto or enfeoff himself, 'car comment il ad deux respects uncore il est mesme le person.'

[2] See *Eccl. Com.* v. *Pinney* [1899] 1 Ch. 99, a case prophetic of the ultimate fate of the glebe.

[3] In looking through the Year Books for the corporation sole, I took note of a large number of cases in which this term is not used, but might well have been used had it been current. I thought at one time of printing a list of these cases, but forbear, as it would fill valuable space and only points to a negative result. The discussion of the parson's rights in F. N. B. 109-112 is one of the places to which we naturally turn, but turn in vain.

THE FAULT IN CASES OF COLLISION AT SEA AND THE RESPONSIBILITY OF SHIPOWNERS.

IF the question is put, What is the true rule in regard to any question of maritime right? two answers may be given. It may be said that the rule is the given law soundly interpreted. It may also be said that the rule is that which is laid down by the Courts as being in accordance with the practice of commercial men. We prefer the second answer. Even then the Courts may err in the interpretation of the law, or they may err in its application. They are then liable to criticism, and criticism may induce them to alter their opinion. But so long as they maintain their opinion it must be said that the jurisprudence adopted by the Courts is the law in force, that is to say, the *jus quo utimur*.

Setting out from this view we shall begin by stating what is the rule or law in force in cases of collision at sea, and we shall afterwards examine how this is to be explained.

In cases of collision at sea the Courts seek to ascertain which is the vessel which is to blame. The vessel is considered in this regard almost as if it were a living being. If it cannot be proved that there has been *force majeure*, that is to say, that the collision is the result of an inevitable accident, the ship found in fault is condemned to make good the damage. Generally, if the two ships are in fault, the damage is divided between them, and there is granted to the owners of the cargoes a joint recourse against the two vessels. There are some judicial decisions which prove what we have just advanced.

The Tribunal of Commerce of Havre, by a judgment of March 9, 1885, decided that a steamer under way which collides with a vessel at anchor is *presumed to be in fault*, and ought to be declared responsible for the collision if it is not proved that the collision is due to inevitable accident[1].

In a judgment of the Court of Bordeaux of December 1, 1884, it was decided: 'Even if it is established that at the moment when the captain saw the danger of the collision he seriously tried to carry out the manœuvre prescribed by Articles 18 and 19, it is nevertheless certain that this attempt was useless, either because it had been attempted too late, *or because of some inexpertness obscure in*

[1] Autran, Revue de Droit Maritime, I. p. 133.

its cause but none the less detrimental in its results, and that in that only appeared the fault of the captain [1].'

And in a judgment of the Court of Rouen of June 2, 1886 [2]:

'Whereas the initial cause of the collision arose from the fact that the *Pernambuco* instead of steering southward in order to gain sufficient sea room, became entangled with a group of vessels anchored at a distance, which at first appeared sufficient, but which was capable of being suddenly diminished through the influence of the currents which were then in the Tagus (in fact what occurred), whereas taken aslant by one of these currents the *Pernambuco*, which measures 100 metres, was not able to manœuvre sufficiently quickly in order to disengage herself, and came into collision with the *Nile*, which in her turn encountered a contrary current, and whereas *the majority* of the witnesses of the accident have declared this manœuvre to be imprudent, and whereas the existence of the current at ebb tide during this period is a fact of common knowledge known to all who frequent the port of Lisbon, and confirmed by the pilot of the colliding ship himself, and whereas the latter in effect has declared that by reason of the great quantity of water which was descending the river the currents were very bad at this time, and whereas one cannot seriously contend that for the reparation of the damage resulting from the collision the presence of a pilot on board of the *Pernambuco* took away the civil responsibility of the captain and of the shipowners, and whereas the shipowner in the first place is responsible for the acts of all who are entrusted with the navigation of the vessel, and whereas by a measure of prudence and of policy in the common interest of the ships and of third parties authority invests certain men with the special duty of piloting ships at the entrance of harbours and rivers, these men become *de facto* the servants of the shipowner, so that in accepting the risks of navigation he has accepted in advance the consequences of their acts, and whereas on the other hand the captain of the *Pernambuco* is not on his own side free from fault, seeing that he knew the harbour of Lisbon, where his ship made regular stoppages, that he knew that the tide was ebbing, and that the stream was full, and whereas he saw the pilot steer the ship into the midst of the vessels at anchor instead of inclining southwards where there would have been no obstacle, and whereas in not intervening at this moment he associated himself with a manœuvre essentially dangerous, and made both himself and his owners responsible; for these reasons the judgment appealed from is confirmed.'

By a judgment of the Tribunal of Commerce of Marseilles of December 23, 1887, it is said [3]: 'Whereas it remains *uncertain* on both sides *whether a mistake has really been committed*, and whereas *a complete uncertainty exists* on the facts of the case, there is ground

[1] Autran, Revue de Droit Maritime, II. p. 535.
[2] Autran, ibid. III. p. 287.
[3] Autran, ibid. III. p. 590-1.

for making the parties concerned both responsible in equal shares for the damages proved.'

A judgment of the Court of Bordeaux of March 23, 1887[1], decides that a collision is only to be regarded as an inevitable accident when following on an event which could not have been either foreseen or avoided.

The Tribunal of Commerce of Marseilles said in a judgment of March 10, 1893[2], in speaking of a collision—

'Seeing that there is no reason to impute it more to one than the other of the captains, that there are in this collision *uncertainties which cannot be got rid of*, and that in a matter so confused as that of a collision, *the true causes of which cannot be thoroughly understood*, in which the greater part of the facts have been imperfectly comprehended, badly appreciated, wrongly observed by the witnesses themselves, it would not be just to cast upon one of the persons concerned a blame and a responsibility in regard to which *a serious doubt may exist*, considering that there has been in fact a collision, that unfortunately there has been the loss of one of the ships, that since on the one hand the collision was not and could not have been accidental, and that on the other hand it cannot be attributed to the particular fault of one of the captains, it necessarily follows that it comes into the category of those collisions which are doubtful in their cause.'

A judgment of the Tribunal of Commerce of Antwerp of April 13, 1888[3], says: 'The vessel under way which collides with another which is at anchor is presumed to be at fault; in order to exonerate himself her captain ought to *prove that he has not committed any fault*, and that the collision is the consequence either of *force majeure* or of a fault on the part of the ship collided with.'

The Court of Appeal of Athens laid down the following rules[4]:—

'The omission of precautions, even precautions more than ordinary, involves the fault of the captain . . . a collision cannot be deemed accidental when it is the consequence of a fault even of the slightest kind . . . the observance of the rules of navigation constitutes a fault when their violation is enjoined by *force majeure* . . . a ship at anchor ought to manœuvre in order to avoid collision.'

In the *Lebanon* (*owners of*) v. *Ceto* (*owners of*)[5] the House of Lords (overruling the Judge of the Admiralty Court and the Court of Appeal) decided as follows:—

'Two vessels approaching each other in a dense fog without the means of ascertaining the course which either ship is pursuing continue to approach each other, and when one of them which has pursued a correct course finds that the other is pursuing a wrong

[1] Autran, Revue de Droit Maritime, III. p. 27.
[2] Autran, ibid. VIII. p. 695.
[3] Autran, ibid. IV. p. 189.
[4] Autran, ibid. VII. p. 83.
[5] Judgment of Lord Halsbury, 14 App. Ca. 675.

one which must almost inevitably lead to a collision, she still continues a course which was originally right, but which on these facts it appears to me threw upon her the duty of stopping and reversing, and inasmuch as she did not pursue that course I think she was to blame.'

The theory of negligence in Roman law is that a person is not in fault when he has shown the prudence of *diligens paterfamilias*. 'Ea igitur quae diligens paterfamilias in suis rebus praestare solet a creditore exiguntur[1].'

If one is not able to reproach a person with any negligence the accident is supposed to be casual, even if it had been possible to avoid it by an extraordinary degree of prudence[2]. Fraud is not presumed. Neither fault nor negligence is presumed; they must be proved. And it is not enough to prove that there has been fault or negligence. In order to obtain the condemnation of the defendant it must be proved that to him the fault must be imputed.

How can a person be liable for the faults of other persons? According to the main rule only when he is guilty himself, that is, when he is guilty of *culpa in eligendo*. Jurists of the eighteenth century have on this ground opposed the rule which is now in force. Casaregis decides that the shipowner cannot be made liable for the master's fraud if he had no reason to suppose that the master would act in such a manner[3]. Bynckershoek agrees with Casaregis, and says that in cases of collision the owner cannot be made liable, because the master was not empowered to run down other ships[4]. In spite of the opposition of those great men, the law of most nations in our time makes the masters responsible for the damage caused by their servants in the course of the business with which they are entrusted (Code Civil, Art. 1384).

It is clear that the principal ought to be condemned only when the servant is proved to be guilty of fault or negligence. If the principal had acted personally he must only be responsible when he has been proved to be guilty. If he must pay for his servant he need pay only if the servant has been in fault.

It is this theory which is said to be followed in cases of col-

[1] Fr. 14 Dig. 13-7. Code Civil, Art. 1383. [2] Fr. 11 Dig. 18-6.

[3] 'Merito receptum est, quod quotiescumque hujusmodi abfuerit culpa ex eo quod dominus eligerit viros communi existimatione probos et idoneos, toties dominus non tenetur ex delicto praepositi, qui mores mutaverit . . . sufficit in hac etiam (o: exercitoria) dominum in adhibendo et praeponendo diligentiam adhibuisse, quo casu delictum ministri consideratur tanquam casus fortuitus.' Casaregis, Discursus legales de commercio, Disc. cxv, 1740, tom. I, p. 348.

[4] 'Constabit ex facto quidem magistri teneri exercitorem sed non ex alio facto quam cui praepositus sit . . . Omnis praepositio est ex mandato sive expresso sive tacito et si quid delinquit magister dum id mandatum exsequitur, etiam exercitor tenetur. Ei autem mandatum non est aliorum naves dolo vel culpa obruere, quod si fecerit, ipse damnum quod dedit luat, non exercitor.' Bynckershoek, Quaestiones juris privati, lib. IV. c. xxiii.

lision. One first finds, it is said, whether the captain is to blame, and if it is established that he is in fault, from this it follows that the shipowner has to pay. If no fault is established the collision is regarded as accidental.

Judgments can be found which are based on this theory. A judgment of the Tribunal of Commerce of Antwerp of June 26, 1890[1], says: 'It is then necessary to admit that there is doubt as to the causes of the collision, or rather that neither of the captains furnished proof of the mistake which he imputed to his adversary, and that they ought both to be acquitted of the charges brought against them.' As there are many decisions in cases of collision one is able to find several judgments on the lines of that last cited. But the great majority of the judicial decisions are not so. The practice, so far as we can gather it, is illustrated by the judgments which we cited at the beginning. In reviewing them we see that they say that it is necessary to *presume* a mistake, that the owners ought to be responsible if it is *uncertain* whether there was really a mistake, that the captain in order to free himself ought to prove *that he had not been guilty* of a mistake. Ships have been held responsible without there having been negligence. In the matter of the *Ceto* the captain had understood the law as the judges in the Admiralty Court, and in the Appeal Court, and two of the judges of the House of Lords, had understood it. The captain had erred perhaps, but had he committed a fault in regard to which one would ask reparation from him? Would one seek to make a member of the Court of Appeal personally responsible because his decision is overruled by the Supreme Court? The judge of the Court of Appeal however has had plenty of time to consult authorities, to study the matter before coming to a decision, whilst the captain is on the deck, and has, without a moment of reflection being given him, to make an immediate decision in the most difficult circumstances. In rendering the captain thus responsible one throws overboard the theory of mistake, one terms a mistake what is after all an error of judgment of the most excusable character, which the most prudent man might commit. In obliging the captain to pay one commits a manifest injustice. But it will be said one does not ask the captain to pay the damages resulting from the collision. Jurisprudence, *jus quo utimur*, decides that neither the captain nor the pilot should be made to pay the consequences of what we term a fault. It is true, but the reason is because the instinct of justice revolts against the consequences of the theory. According to the theory of the fault it is impossible not to oblige them to pay. We make the shipowner pay, although

[1] Autran, Revue de Droit Maritime, VII. p. 585.

he is innocent, because he is presumed to have committed the fault which his servant has in reality committed. How is it possible then to say that the person who has really committed the fault ought not to pay?

M. de Valroger quotes[1] a proposal made in 1867 for the alteration of the French law on this point to the following effect:—

'Art. 421. If there is a fault committed on the part of the two ships the whole of the damages are added together and are borne by the two ships in the proportion of the seriousness of their faults respectively proved to have contributed to the accident.'

'Art. 423. The proceedings are brought against the colliding vessel in the person of her captain or of her owners. The captain incurs personal responsibility only if there has been on his part fault or negligence.'

The Congress of Maritime Law at Genoa in 1892[2] passed the following resolution:—'Every ship is an assumed person with a responsibility limited to its value.'

The dominant idea which underlies these conclusions is that one is able to make the owners pay and not the captains. The Congress at Genoa arrives at that notion by the fiction that the ship is an implied person.

The project of 1867 said that the captain ought to be responsible only if there is on his part fault or negligence. The framing of this proposal is not one of the most happy; one does not know if the two words 'fault' or 'negligence' ought to have the same meaning, or if the captain ought to be responsible not only if there is negligence on his part, but also if he has committed a mistake. In this last case the word 'faute' or fault ought to signify what we have termed error of judgment, but this last solution appears to us to be inadmissible. It appears certain that the intention of the authors of the project of 1867 has been to transform into law the decisions of practice which tend to make the shipowners responsible in every case, and the captains only if they have neglected their duties.

The inner thought of the theory in regard to collision at sea is that it is necessary to make the shipowners liable, and that one can arrive at this result only by deciding that there is fault, and that the shipowners ought to be responsible for their servants. That it is necessary then to make this responsibility weigh also upon the captains is a great pity, but it is a consequence that one is not able unfortunately to avoid.

What is called fault in regard to collisions at sea is quite another thing than the fault of common law. In practice one investigates the causes

[1] De Valroger, Droit Maritime, 1886, V. p. 109.
[2] Autran, Revue de Droit Maritime, VIII. p. 176.

of the collision, and if one is not able to prove that there has been *force majeure*, one has to say that there is a fault and responsibility. If fault were admitted only where there were negligence the captains would be acquitted in the great majority of cases.

'The acquittal of the captain in criminal proceedings against him in consequence of a collision does not present an obstacle to the commercial Courts deciding that the collision is due to the fault of the captain and placing the responsibility for it upon him and upon his shipowners,' said the Tribunal of Commerce of Havre in a judgment dated March 3, 1885[1].

Seeing the immense interests confided to the captains the shipowners must use the utmost care in their selection, and it is for this reason rare to find cases where the responsibility of the captains arises from the simple negligence which founds their responsibility according to the principles of the common law. It is always, or nearly always, an error of judgment which may occur in the best captain, for the simple reason that men are not infallible.

The theory of the fault is just when the captain is guilty of negligence; the shipowner is obliged to pay, but can indemnify himself through the captain. If there is no fault within the meaning of the common law the shipowner is bound to pay unless an inevitable accident can be proved, and yet he cannot make the captain responsible.

It is necessary to recognize that a person can in some cases without injustice be forced to pay damages, although he may not have been in fault. That happens when the owner of wild beasts has to pay the damage which his animals have occasioned. That is the rule in the English law, in Danish law (Code 6. 10. 4), and in German and French law[2]. Any one who keeps a caravan of wild beasts is said by the English law to do so at his own peril, and will be liable should any damage be done through the escape of a tiger, although he may have taken the greatest possible care to prevent the mischief[3]. The Danish law provides that if wild beasts do mischief the owner and the person in whose possession they are are obliged to pay as if they personally had done the mischief. It matters little that the possessor may have used the greatest precautions; he must pay, and that because the possession of wild beasts is of no value to human society. It is otherwise with maritime industry; it is useful and even indispensable. But there is another consideration which presents itself: *ex qua persona quis lucrum capit ejus factum praestare debet*[4]. The shipowner who

[1] Autran, Revue de Droit Maritime, I. p. 133.
[2] Code Civil, Art. 1385. Unger, Handeln auf eigne Gefahr, 2nd edition, p. 70.
[3] Holland, Jurisprudence, 5th edition, p. 149.
[4] P. 149. Digest (30-17).

profits from his industry ought to bear the risks in so far as the laws consider necessary in order to protect the security of navigation.

The interests confided to the captain of a ship are immense. Not only enormous values, but the lives of men are at stake. Thus one ought to exact from him the greatest precautions; his negligence, even the slightest, is punished. But that is not enough; it is necessary to interest the shipowners in order to select captains and crew carefully. Unless *force majeure* can be proved the shipowner is made liable not only for the fault but also for the error of judgment of the captain. The rule *casum sentit dominus* means only that the owner of a thing ought to bear the loss unless there is any reason to make another bear it; it is simply negative. When a collision has taken place, and the manœuvre of one of the vessels is in no respect to blame, while the captain of the other vessel has been guilty of a mistake, it is not contrary to justice to make the owner of the latter vessel bear the damage. It is with good reason, we consider, that the Belgian Association for the Unification of Maritime Law has passed the following resolution: 'The owner of a ship is civilly responsible for the *acts* (not only the faults) of the captain.' One says in practice that the ship (not the captain) is to blame and ought to bear the damage.

One can say that shipowners are by law forcibly rendered insurers of the damage which their industry may cause other people. The shipowner who has paid can recover his loss from his captain, but only if the captain is guilty of fault or negligence; the captain has not the profit of the navigation, and ought not to bear its risks. One finds some analogy in Art. 1733 of the Civil Code on the subject of hirer's risk. According to the terms of this article the hirer 'is responsible for loss through fire unless he is able to prove that the fire occurred by accident or by *force majeure*.' In the same order of ideas the person who constructs or maintains a railway is answerable for the damage which results from the working. Whoever works a railway takes upon himself the liability of the undertaker [1].

In the case of collision at sea the owner of the ship colliding is made liable not only for the damage to the ship collided with, but also for that which is caused not only to the cargo which it is chartered to transport, but also to that which the collided ship was transporting. The practice is universal to grant such a claim, and we sup-

[1] The undertaker answers for all the accidents of the undertaking which arise from the fault of the undertaking. Unger, Handeln auf eigne Gefahr, p. 87. The undertaker ought in principle to answer for damage which is not imputable to him personally. Unger, ibid. p. 90.

pose that there is no one who would advocate a contrary rule. It is necessary, however, to recollect that the ship collided with and its cargo have not, according to the common law, the right of being indemnified by the owner of the colliding ship. The principal rule is that one ought only to pay the damage if one is in fault. The owner of the ship colliding is however perfectly innocent. He has committed no fault ; in selecting he has chosen the best captain, he has chosen him from amongst the persons named by the State as capable. He is innocent even in the case where the captain is in fault.

How is it possible to maintain that the ship collided with and its cargo have, according to the principles of the common law, the right of being indemnified by the owner of the colliding ship? The owner of the ship collided with and the owner of the cargo have exposed their belongings to the risks of navigation, and can insure themselves against those risks. Also, it seems to us there is no reason to assert in principle that they have the right of demanding reparation from a person perfectly innocent. In granting them such a claim the law grants them an advantage to which they have no natural right. It follows from that that one does not do them any wrong in limiting the liability of the owner of the ship collided with, nor even in refusing all recourse against the owner of the ship colliding which founders in consequence of the collision.

We have noted that it is not customary to make the captain pay in case of a collision at sea. However, we do not very well understand how it is possible to acquit him if one bases it on the theory of the fault. Danish legislation, which has also a provision admitting the responsibility of the principal for the faults of his servants, adds that the principal can indemnify himself as against the agent[1]. How is it possible to come to any other conclusion? Would it ever be possible to condemn the innocent person because he is assumed to have committed the fault attributed to his agent, and to acquit the person who has in reality committed it?

The Courts have had to concern themselves with this question in the following case. The German ship *Thuringia* had entered the port of Curaçao, and the captain had left the conduct of the vessel to the pilot, whose presence on board was compulsory. The *Thuringia* collided with and ran down the ship *Mediator*, the owner of which demanded reparation for the damage. Several law suits were the consequence. In several judgments one finds that the liability of the captain was not taken away by the fact of the presence of a pilot on board, because in spite of that the captain retains the command of the ship. The aforesaid judgment of the

[1] Code 3. 19. 2. [By the Common Law the person actually in fault is always liable. But it is almost always more profitable to sue the principal.—Ed.]

Court of Rouen of June 2, 1886, said that the captain should have opposed the wrong manœuvre of the pilot, and that in making no observation he associated himself with a manœuvre essentially dangerous, and in so doing he incurred liability for himself and at the same time for his shipowners.

The Reichsgericht adjudged on the contrary in a proceeding against the captain of the *Thuringia* by a judgment of July 12, 1886[1], that one 'ought not to blame the captain of the *Thuringia* for not having given directions for slackening the speed, which he came to the conclusion was dangerous. He had not to intervene in a manœuvre by the compulsory pilot. It was a heavy responsibility which he could not be called upon to assume.'

The Tribunal of Commerce of the Seine has had to decide on the same question. Some underwriters representing the interests of the *Mediator* brought an action against the captain and the owners jointly. In the judgment of March 26, 1887[2], one reads: 'It appears from the documents that it is compulsory for foreign ships entering the port of Curaçao to take on board a pilot to navigate the vessel. . . . that the captain had ceased to have control of the ship by reason of the presence on board of the ship of the pilot of the port, and that further no fault could be charged against him.' It was therefore held that he could not be considered personally responsible for the collision which occurred under the control of the pilot who had been forced upon him, and that in consequence the claim put forward by the underwriters against him on account of the loss arising from the collision ought to be rejected.

So far as concerned the Hamburg Company the judgment proceeds:—

'Seeing that the Hamburg Company is the owner of the ship *Thuringia* which collided with and run down the ship *Mediator* in the harbour of Curaçao on July 7, 1884, that contrary to the contentions of that company the presence on board of a pilot imposed by the laws which regulated the entry of ships into the port of Curaçao could not exonerate it from the liability for a loss caused by the collision of the ship belonging to it. . . . that by the application of the principles of the common law it had to make reparation for the damage.'

On these grounds it was declared that the underwriters were not warranted in their claim against the captain, but the Hamburg-American Company was condemned in damages in favour of the underwriters.

Mr. Alfred de Courcy speaks of this judgment in an essay entitled

[1] Autran, Revue de Droit Maritime, II. p. 716. [2] Autran, ibid. III. p. 35.

'Two Attempts at Revolution in Jurisprudence[1],' and says that it overthrows jurisprudence in order to be consistent with justice.

We think that the solution sanctioned by the Tribunal of the Seine is in conformity with the *jus quo utimur*, especially if one observes that Courts have very seldom to decide in proceedings against captains, because public opinion is opposed to such actions.

It is true, however, that one is able to find judgments which declare captains responsible, but they are rare. Captain Chantreau was part owner of a vessel which he commanded. Following upon a collision he sued for payment of his insurance, but the Tribunal of Commerce of Marseilles adjudged on July 27, 1888[2]—

'That the accident not being able to be attributed to *force majeure*, and not being able to be considered of doubtful origin because one of the ships was anchored and immoveable, and in such a position that it could not be manœuvred, the accident must of necessity be taken to have arisen from a fault and an error on the part of Captain Chantreau; that under these circumstances the company from which he claims payment of the insurance, being in a way able thus to prove the fault of the captain, should not be held responsible to him for the amount of the insurance so far as his share of the ownership of the lost vessel was concerned.'

We think that this case was wrongly decided if the captain was not guilty, except of a mere error of judgment. What does it matter to the assurers whether the captain or any one else happens to be the owner of the vessel? If the owner had not been the captain the assurance company would have been condemned.

A similar case happened at Gothenburg in Sweden. It was clear that the collision was owing to the fault of the seaman who was on watch. This seaman was part owner of the vessel. The company, desirous of taking advantage of this circumstance, refused to pay. This produced so much indignation at Gothenburg that the merchants of the town made themselves responsible for the payment of the insurance.

It is impossible, as we think, to arrive at the liability of the owner by putting into force the rule that he ought to be responsible for his servants.

Can the captain be said to be the servant of the shipowner when the shipowner charters his ship to another who has himself chosen the captain? Can the captain be said to be the servant of the owner when he has been nominated by the consul in the absence of the owner? Is it possible to say that compulsory pilots 'become *de facto* the servants of the shipowner,' according to the before-mentioned judgment of the Court of Rouen of June 2, 1886? Such a thing is a pure fiction, but the fiction is only the

[1] Autran, Revue de Droit Maritime, III. p. 110. [2] Autran, ibid. IV. p. 439.

confession the doctrine has to make of its own inability to explain the juridical facts which result. One is able to explain everything by fiction, in other words it explains nothing.

It is impossible to maintain that the compulsory pilot is the servant of the shipowner. A judgment of the Tribunal of Rotterdam of December 1, 1883 [1], condemning the captain of the ship in spite of the fact that he had on board a compulsory pilot, has in our view placed its decision upon wrong grounds in deciding that the pilot was only a guide. This same judgment decided that the pilot had incurred no civil responsibility, but was amenable only to the penalties prescribed by the regulations. This last point will be approved by everybody, but the pilot ought to have been acquitted because he was undoubtedly guilty only of an error of judgment.

In criminal law the distinction between grave fault and slight fault is of the utmost importance; it is not so in civil law. He who has committed a slight fault will be made answerable for the whole damage. He would not be more liable if he had committed a grave fault. If two persons are found guilty of fault they are jointly responsible for the whole of the damage without there being any occasion to inquire which of the two is guilty of the grave fault or of the slight fault. This result, although inevitable according to the theory of the fault, is perhaps repugnant to common sense, especially if there is on one side not even a slight fault, but only an error of judgment. It is apparently in such cases that the English judges have said that with regret they must find the other vessel also to blame. It seems to be the general wish that the damage should be divided between ships in proportion to the gravity of their faults. We are perfectly in agreement with this view—only this conclusion cannot be deduced from the rules which govern the theory of the fault.

Ought this principle of proportionate contribution to be extended to the owners of cargoes? It has been said that when the proportion between the faults of the ships has been ascertained, the two ships ought to be responsible jointly to the owners of cargoes in this same proportion. We are still absolutely agreed. But the question arises, Why should the owner of one of the ships be ruined for the advantage of the owner of the cargo, or rather for the advantage of his assurers? According to the present theory of the fault we do not know how we can escape from this result. Accepting our view there would be no difficulty. The owner of the cargo has no right according to natural justice to any reparation. The right which is granted to him is an advantage to him,

[1] Autran, Revue de Droit Maritime, I. p. 257.

utilitatis causa introductum. It follows from this that one is able to limit it, and that it is necessary to limit it. The responsibility of the owner is founded on the necessity to secure navigation, but it is unjust to extend this liability beyond that limit.

The view that a liability imposed by law, *utilitatis causa*, should be limited by law to the extent necessary to prevent the burden of the liability being unjust may be illustrated by reference to the English law relating to innkeepers. For the sake of the preservation of the goods of travellers the common law made the innkeeper liable for the negligence or default by himself or his servants in keeping the goods of the guest. The loss of the goods was presumptive evidence of such negligence, which it was for the innkeeper to rebut by showing that the loss happened by the negligence of the guest or by *force majeure*. The law implied a promise on the part of the innkeeper to take care of the goods of his guest according to his common law duty. By the 26 & 27 Vict. c. 41 it was provided that if the innkeeper complied with certain statutory formalities his liability would be limited to the sum of £30, unless the loss occurred through the wilful act, default, or neglect of the innkeeper or of his servant, or unless the goods were expressly deposited with the innkeeper for safety.

One asks oneself if in cases of collision the whole damage should be paid. The International Committee of Maritime Law has put this question:—'Ought damages awarded in cases of collision at sea to constitute a complete reparation for the injury done?' The majority of the answers were in the affirmative. However, the English Committee answered, 'Yes, in principle'; and the Committee of the Netherlands, 'Yes. There exists no sufficient reason to confine reparation for damage done to that directly caused to the body of the ship as it has sometimes been laid down by the jurisprudence of the Netherlands.'

The Tribunal of Commerce of Marseilles in a judgment of August 1, 1888[1], decided that the breaking of the affreightment resulting from collision is a loss indirectly occasioned for which the ship colliding is not answerable. The Danish Courts grant in cases of collision reparation of the damage caused to the body of the ship, and also loss through demurrage: the latter is ascertained according to the rules of Danish law without regard to what has been agreed in the charter party.

We see that in the jurisprudence of some countries one does not grant total reparation for damage done. Is there any reason to complain of this jurisprudence, and to wish that it should be modified? We do not think so, and that for the reason which we

[1] Autran, Revue de Droit Maritime, IV. p. 309.

have indicated. M. Unger says that from the moment when the shipowner is obliged to pay damage which it is impossible to regard him as being personally responsible for, it is but just to place a limit upon his liability [1].

It may be objected against us that all the decisions rest upon the theory of the fault, and that it is absurd to wish to abolish it with a stroke of the pen. Those who so object will be wrong. That the actual practice has been developed upon the lines of the theory of the fault may well be, but that does not matter; the theory of the fault has become transformed into customary right, the *jus quo utimur* is only the collection of judicial decisions. If we can deduce from these decisions that they make the owners pay in cases of collision, but that they refuse to make captains and pilots pay, we cannot (although it has been sought to be said) maintain that they rest on the theory of the fault. In speaking thus we are not seeking to alter; we take the practice as we find it, and we seek to explain it to the best of our capacity.

A. HINDENBURG.

[1] Handeln auf eigne Gefahr, p. 95.

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THE FORMS OF POLITICAL UNION.

IN a well-known passage in the Essay on the Human Understanding, Locke, in a mood of despondency, observes that if one 'shall well consider the errors and obscurity, the mistakes and confusion that are spread in the world by an ill-use of words, he will find some reason to doubt whether language, as it hath been employed, has contributed more to the improvement or hindrance of knowledge among mankind.' The student of politics feels the hindrance more than any other searcher after knowledge; for it is his to work with the materials furnished, often unconsciously, by those who are little given to an exact use of terms. In England it might have been expected that the close relation of law and politics would have helped us to an exact use of political terms; it has instead given us a legal language which is principally famous for its inexactness, its want of settled technical terms. The study of Jurisprudence has done little to supply the defect; it has in fact never recovered from a bad start. Bentham's terms were generally too clumsy and often too fanciful for common use; Austin has repelled the generation which followed him by his attempt to force common language into a single and sometimes unfamiliar meaning.

There are no political terms which are less susceptible of exact definition, or even of formal analysis, than those which are used of the different forms of political organization. The term 'State' itself, which as 'status' and 'estate' has done duty in the law of personal conditions, and in the law of property, is amongst jurists and publicists the accepted term for the 'independent political society,' and has been broken in to describe a subordinate government in a certain mode of organization, so that the writers on the American Constitution are driven to distinguish the two meanings of the term by the use of a small or a capital S. The distinguished author of Political Science and Constitutional Law, indeed, meets the difficulty by doing some violence to the formal terms of American law, for he uses 'state' to describe the sovereign organism, and in the teeth of the Constitution, drops the 'State' and uniformly speaks of the subordinate government as 'the Commonwealth.' But this use of 'State' and 'Commonwealth' is inverted in the Australian Constitution, and in that, the latest of Constitutions, 'Commonwealth' is used to describe an organism,

which, though not sovereign, corresponds in everything but its subordination to the Imperial Parliament with the United States, and while the 'State' is, as in America, the subordinate constituent, an attentive reading of the Commonwealth of Australia Act will show that even there 'Commonwealth' has more than one meaning. Sometimes it is the political organism established by the Act; sometimes it is the territorial limits of that political society, often it is the central government of that society or some appropriate organ thereof. In the confusion of meanings which attach to political terms, it is important to ascertain the sense in which on a particular occasion, or in a particular connexion, a particular term is used; and it is above all things important not to dogmatize about essentials if we would not lose touch with the actual facts of the institutions of the nations.

Permanent political unions are commonly classed as *Confederation*, *Incorporation* (or *Consolidation*), and *Federation*. The nature of Confederation as a type of political union is simple, though the name is not unfrequently applied to organizations which in fact belong to one of the other classes, as when we speak of the Confederation of Canada, or the Confederacy of the Swiss Republic. It is an alliance of states in which the central power represents only the governments of the several members of the union; its powers consist simply in issuing requisitions to the state governments, which, when within the limits of the federal authority, it is the duty of those governments to carry out. The purposes for which requisitions may be made are those which the parties have submitted to the 'federal power'; they may be few or many, and might conceivably extend to everything upon which sovereign power can operate. But so slight a tie will not bear the pressure of many or indefinite requisitions. Defence against external aggression, probably the conduct of foreign affairs, and the determination of disputes between the States, which, by disturbing internal tranquillity, expose the Confederacy to the danger of attack from without; these are the objects to which a system of confederate states is likely to be confined. But 'confederate' elements may be found even in the closer unions. In the German Empire, which perhaps from its monarchic government and the mode of its establishment as much as from the scope of the central authority, is often regarded as a consolidation rather than a federation, the Bundesrath—an upper chamber which overshadows the lower—is distinctly confederate. Its constitution might easily mislead us as to its character. The States are unequally represented; their membership roughly corresponds with their population and importance; it therefore suggests a national democratic

organization. But its true nature is thus accurately described by Mr. Lawrence Lowell:

'It is not an international conference, because it is part of a constitutional system, and has power to enact laws. On the other hand, it is not a deliberative assembly because the delegates vote according to instructions from home. It is unlike any other legislative chamber, inasmuch as the members do not enjoy a fixed tenure of office, and are not free to vote according to their personal convictions. Its essential characteristics are that it represents the governments of the States and not their people, and that each State is entitled to a certain number of votes which it may authorize one or more persons to cast in its name, those persons being its agents whom it may appoint, recall, or instruct at any time. The true conception of the Bundesrath, therefore, is that of an assembly of the sovereigns of the States, who are not indeed actually present but appear in the persons of their representatives[1].'

Incorporation differs from Confederation in that it substitutes a new state for several states, in every case at any rate where the incorporation does not consist merely in the absorption by one state of part of another state. The state possesses a government which may or may not be sovereign, but which, in one form or another, pervades the whole territory of the state, and is capable of affecting all its subjects. If there be governments of parts of the state—what are called local governments—they will commonly (but not necessarily) derive their existence and authority from the central government, and in any case they will be subject to its regulation and will rely upon its organs for their support. Complete unification would seem to imply such a homogeneity of the institutions of the state as would remove all the marks of the former separateness of the component parts. But such a unification would hardly contribute to the stability and durability of the state, and the new state will act wisely to seek and retain the ancient landmarks. In practice, consolidation does not in fact obliterate the original lines of division; and the retention of these lines furnishes what are called the federal elements of an incorporated union. From one point of view the United Kingdom of Great Britain and Ireland is a perfect incorporation or consolidation, as it is one state, whose government—the Imperial Parliament—unlimited in scope, supreme in authority, and unitary in action, is rightly regarded as a type of sovereignty in its simplest and most direct form. But the constitution of both Houses of Parliament, and the separate administrative and jural systems, are the legal recognition of the Three Kingdoms as separate units, and are the federal elements in the union. To say that these 'federal

[1] Lowell, Governments and Parties in Continental Europe, vol. i. pp. 264–5.

elements' exist by virtue of the law, and therefore by sufferance of the state, is to say no more than may be said of every part of every federation. The popular description, 'legislative union,' expresses the condition of the United Kingdom better than any term which can be applied to it.

Federal union differs from Confederation in this—that it creates a new political organism: a state possessing all the attributes of sovereignty. It is universal in scope, exclusive of every other Power, and of necessity supreme over and acting upon all persons and things within its territory. To distinguish the 'federal state' from the 'unitary state' is a much more difficult task. The distinction lies not in the nature of the state itself, but in the organization of government. In every 'federal state' the government consists of central and local parts, neither owing its existence to the other nor capable of destruction by the other. The central government, in matters within its sphere, extends over the whole territory and population of the state; the local government is restricted in area. But while this may be said of every state called federal, the same may be said of states regarded as unitary, where local institutions are directly established by the Constitution. Seeley [1] denies altogether that there is any fundamental difference between the unitary and the federal state, and adopts those terms merely as 'marking conveniently a great difference which may exist between states in respect of the importance of local government.' Even the preponderance of the local government, which Seeley regards as the mark of the federal state, can hardly be regarded as essential. In Canada, the residuary power of government lies in the central and not in the provincial power; and the control which the Dominion Government may exercise over the provincial in every department warns us that the doctrine of the independence of the governments in their respective spheres must not be pushed too far. Neither in the United States nor in Germany can we truly speak of the preponderance of local government. On the whole we must be content with some vague description, as that the independence of the local government surpasses anything which can fairly come under the head of municipal freedom [2]; or we may adapt Lewis's [3] description of a subordinate government, as one which possesses powers and institutions applicable to every purpose of government, and which would thus be capable of governing the district subject to it, if the supreme government were altogether withdrawn.

[1] Seeley, Political Science, pp. 95, 100.
[2] Freeman, History of Federal Government (2nd ed.), p. 2.
[3] Lewis, Government of Dependencies (ed. Lucas), pp. 72, 73.

To say no more than this is to describe very imperfectly any federal union that now exists or has ever existed. But the organisms which go by the name of Federations present so great a diversity that beyond the characteristics named there is hardly anything that may be deemed essential save agreement. In general the new state has been formed by the coalescence of several states, which preserve their existence as units and maintain a large part of their previous organization and functions as the 'local part' of the government of the new state, and as units are the basis of the organization of the central government. This, with the fact that the functions they discharge are not enumerated while those of the central government are, gives them the appearance of an independent existence which leads to such statements as that there is 'a residuary sovereignty in the State' (meaning the component state), that a federation is a 'union of sovereign states,' and that a federal state differs from other states by the fact that it is one state and several states. In a complex political organism, where law and politics are necessarily entwined, the importance of a clear appreciation of these matters cannot be overrated. 'It requires patient and successful discrimination to attain a point of view from which it is clearly seen that there can be no such thing as residuary sovereignty; that sovereignty is entire or not at all; and that what is left by the state to the local organizations, in this manner of distribution, is only the residuary powers of government[1].'

But the coalition of separate states is not the only way in which a federal state may be established. The experience of the Dominion of Canada has disproved the doctrine of Freeman, that 'a Federal Union, to be of any value, must arise by the establishment of a closer tie between elements which were before distinct, not by the division of members which have been hitherto more closely united[2].' Without going so far as Mr. Goldwin Smith, who speaks of that union as the creature of deadlock[3], we must recognize that the immediate occasion of the accession of Upper and Lower Canada to the Confederation proposed by the Maritime Provinces was the perception of the leading men of both parties, that Confederation offered an escape from the embarrassment of a legislative union which had proved too close a tie. The very general interest in federation at the present day is due to the belief that it offers an escape from the dangers of over-centralization in large States.

The complete and separate equipment of the central and local

[1] Burgess, Political Science and Constitutional Law, vol. ii. p. 7.
[2] Freeman, History of Federal Government (2nd ed.), p. 70.
[3] Canada and the Canadian Question, p. 143.

governments for the discharge of the three governmental functions —legislative, executive, and judicial—might well be considered essential to the federal form. But a rigid adherence to this test would raise the question of the federal character of the German Empire, where executive power practically rests on the arm of Prussia, and where as to judicial power the organization of the Courts of the States is controlled by imperial legislation. In Canada, the judges of the provincial courts are appointed, paid, and —should the occasion arise—removed by the Dominion Government.

The division of powers in a Federal State between central and local organs implies some machinery for confining each to its sphere. But no one method for enforcing those limitations can be deemed essential. The power of the Courts, as an incident of ordinary judicial duties, to interpret the Constitution, and prevent the other organs from exceeding their powers, belongs fundamentally neither to a written constitution nor to federation, for both may and do exist without it. It is in some respects even the contradictory of federation and its separation of powers. Its origin is in the unity and universality of the English Common Law, and the jealousy of the Common Law Courts. For the source of what has been to so many Englishmen the mystical power of the Supreme Court of the United States, we must look rather to the conflicts of Coke and Bacon than to the letter of the constitution of the United States.

If there be no essential difference in the scope even of a Confederation and an Incorporation, if the former may embrace every subject over which governmental power can be exercised, we are not likely to find the true test of federalism in the purposes of the union. So great an authority as Freeman, however, has said, 'The true and perfect Federal Commonwealth is any collection of States in which it is equally unlawful for the Central Power to interfere with the purely internal legislation of the several members, and for the several members to enter into any diplomatic relations with other powers[1].' This may describe, with some approach to accuracy, the principle of the United States Constitution; but in neither of these elements does it truly describe the Constitution of the German Empire, and it is wholly inapplicable to such unions of dependent communities as constitute the Dominion of Canada and the Commonwealth of Australia. 'All must be subject to a common power in matters which concern the whole body of members collectively[2]' still leaves the question—What are such common matters? The

[1] Freeman, History of Federal Government, p. 8. [2] Ib. p. 2.

answer can only be, those which the parties have declared to be common.

Comparing the existing political unions with the three types, we find that no actual union does more than approximate to a type, and that it must be placed in one class or another according to the preponderance of one or the other elements in it. The Confederacy of the United States did not operate wholly upon governments; the government of the present union contains elements national, federal, and confederate. As has been pointed out, the German Empire is sometimes regarded as a unitary state, sometimes as federal, but it contains at any rate one mark of confederation. The incorporate union of Great Britain and Ireland has federal features in its government; and the 'confederation' of Canada produced an organism without confederacy, and with a government which in many of the matters commonly associated with the federal form, exhibits the marks of the unitary rather than the federal government. In the formation of every political organism the only rule can be political expediency.

W. Harrison Moore.

THE THEORY OF JUDICIAL PRECEDENTS.

THE importance of judicial precedents has always been a distinguishing characteristic of English law. The great body of the common or unwritten law is almost entirely the product of decided cases, accumulated in an immense series of reports extending backwards with scarcely a break to the reign of Edward I at the close of the thirteenth century. Orthodox legal theory indeed long professed to regard the common law as customary law, and the reported precedents as merely evidence of the customs and of the law derived therefrom. But this was never much better than an admitted fiction. In practice, if not in theory, the common law of England has been manufactured by the decisions of English judges. Neither Roman law, however, nor any of those modern systems which are founded upon it, allows any such place or authority to precedent. They allow to it no further or other influence than that which is possessed by any other expression of expert legal opinion. A book of reports and a text-book are on the same level. They are both evidences of the law; they are both instruments for the persuasion of judges; but neither of them is anything more [1]. English law, on the other hand, draws a sharp distinction between them. A judicial precedent speaks in England with a voice of authority; it is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established.

It seems clear that we must attribute this feature of English law to the peculiarly powerful and authoritative position which has been at all times occupied by English judges. From the earliest times the judges of the king's courts have been a small and compact body of legal experts. They have worked together in harmony, imposing their own views of law and justice upon the whole realm, and establishing thereby a single homogeneous system of common law. Of this system they were the creators and authoritative interpreters. They did their work with little interference either from local custom or from legislation. The centralization and concentration of the administration of justice in the royal courts gave to the royal judges a power and prestige which would have been unattainable on any other system. The authority of precedents

[1] [This is so. But in point of fact the importance of reported decisions has been on the increase in both France and Germany for some time.—Ed.]

was great in England because of the power, the skill, and the professional reputation of the judges who made them. In England the bench has always given law to the bar; in Rome it was the other way about, for in Rome there was no corporate body of professional judges capable of doing the work that has been done for centuries in England by the royal courts.

Declaratory and creative precedents.—In proceeding to consider the various kinds of precedents and the methods of their operation, we have in the first place to distinguish between those decisions which are creative of the law and those which are merely declaratory of it. A declaratory precedent is one which is merely the application of an already existing rule of law. A creative precedent is one which creates and applies a new rule. In the former case the rule is applied because it is already law; in the latter case it is law for the future because it is now applied. In any well developed system such as that of modern England, declaratory precedents are far more numerous than those of the other class; for on most points the law is already settled, and judicial decisions are therefore commonly mere declarations of pre-existing principles. Creative precedents, however, though fewer in number, are greater in importance. For they alone develop the law; the others leave it as it was, and their only use is to serve as good evidence of it for the future. Unless required for this purpose, a merely declaratory decision is not perpetuated as an authority in the Law Reports. When the law is already sufficiently well evidenced, as when it is embodied in a statute or set forth with fullness and clearness in some comparatively modern case, the reporting of declaratory decisions is merely a needless addition to the great bulk of our case law.

It must be understood, however, that a declaratory precedent is just as truly a source of law as is one belonging to the other class. The legal authority of each is exactly the same. Speaking generally, the authority and legal validity of a precedent do not depend on whether it is, or is not, an accurate statement of previously existing law. Whether it is or is not, it may establish as law for the future that which it now declares and applies as law. The distinction between the two kinds turns solely on their relation to the law of the past, and not at all on their relation to that of the future. A declaratory precedent, like a declaratory statute, is a source of law, though it is not a source of *new* law. Here, as elsewhere, the mere fact that two sources overlap, and that the same legal principle is established by both of them, does not deprive either of them of its true nature as a legal source. Each remains an independent and self-sufficient basis of the rule.

I have already referred to the old theory that the common law is customary, not case law. This theory may be expressed by saying that according to it all precedents are declaratory merely, and that their creative operation is not recognized by the law of England. Thus Hale says in his History of the Common Law:—

'It is true the decisions of courts of justice, though by virtue of the laws of this realm they do bind as a law between the parties thereto, as to the particular case in question, till reversed by error or attaint, yet they do not make a law properly so called: for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times[1].'

Hale, however, is evidently troubled in mind as to the true position of precedent, and as to the sufficiency of the declaratory theory thus set forth by him, for elsewhere he tells us inconsistently that there are three sources of English law, namely, (1) custom, (2) the authority of parliament, and (3) 'the judicial decisions of courts of justice consonant to one another in the series and succession of time[2].'

In the Court of Chancery this declaratory theory never prevailed, nor indeed could it, having regard to the known history of the system of equity administered by that court. There could be no pretence that the principles of equity were founded either in custom or legislation. It was a perfectly obvious fact that they had their origin in judicial decisions. The judgments of each Chancellor made the law for himself and his successors.

'It must not be forgotten,' says Sir George Jessel, 'that the rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented[3].'

But both at law and in equity this declaratory theory must be totally rejected if we are to attain to any sound analysis and explanation of the true operation of judicial decisions. We must admit openly that precedents make law as well as declare it. We must admit further that this effect is not merely accidental and indirect, the result of judicial error in the interpretation and autho-

[1] Hale's History of the Common Law, p. 89 (ed. of 1820).
[2] Ibid. p. 88.
[3] *In re Hallett*, 13 Ch. D. at p. 710.

ritative declaration of the law. Doubtless judges have many times altered the law while endeavouring in good faith to declare it. But we must recognize a distinct law-creating power vested in them and openly and lawfully exercised. While it is quite true that the duty of the courts is in general *jus dicere* and not *jus dare*, nevertheless they do in fact and in law possess both these functions. Creative precedents are the outcome of the intentional exercise by the courts of their privilege of developing the law at the same time that they administer it.

Authoritative and persuasive precedents. — Decisions are further divisible into two classes, which may be distinguished as authoritative and persuasive. These two differ in respect of the kind of influence which they exercise upon the future course of the administration of justice. An authoritative precedent is one which judges must follow whether they approve of it or not. It is binding upon them and excludes their judicial discretion for the future. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration, and to which they will attach such weight as it seems to them to deserve. It depends for its influence upon its own merits, not upon any legal claim which it has to recognition. In other words, authoritative precedents are *legal* sources of law, while persuasive precedents are merely *historical*. That is to say, the former establish law in pursuance of a definite rule of law which confers upon them that effect. The latter, if they succeed in establishing law at all, do so indirectly, through serving as the historical ground of some later authoritative precedent. In themselves they possess no legal authority.

The authoritative precedents recognized by English law are the decisions of the superior courts of justice in England. The chief classes of persuasive precedents are the following:

(1) Foreign decisions, and notably those of American courts[1].

(2) The decisions of superior courts in other portions of the British Empire, for example, the Irish courts. 'Decisions of the Irish courts, though entitled to the highest respect, are not binding on English judges[2].'

(3) The decisions of the Privy Council when sitting as the final Court of Appeal from the colonies. In *Leask* v. *Scott*[3] it is said by the Court of Appeal, speaking of such a decision in the Privy Council: 'We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it.'

[1] *Castro* v. *R.*, 6 App. Cas. 249.
[2] *In re Parsons*, 45 Ch. D. 62.
[3] 2 Q. B. D. 376, at p. 380.

(4) Judicial *dicta*, that is to say, decisions which go beyond the occasion, and lay down a rule wider than is necessary for the purpose in hand. We shall see later on that the authoritative influence of precedents does not extend to such *obiter dicta*, but they are not equally destitute of persuasive efficacy [1].

Absolutely and conditionally authoritative precedents.—Authoritative precedents are of two kinds, for their authority is either absolute or conditional. In the former case the decision is absolutely binding and must be followed without question, howsoever unreasonable or erroneous it may be considered to be. It has a legal claim to implicit and unquestioning obedience. Where, on the other hand, a precedent possesses merely conditional authority, the courts possess a certain limited power of disregarding it. In all ordinary cases it is binding, but there is one special case in which its authority may be lawfully denied. A precedent belonging to this class may be overruled or dissented from, when it is not merely wrong, but so clearly and seriously wrong that its reversal is demanded by the interests of the sound administration of justice. Where this is not so, the precedent must be followed, even though the court which follows it is persuaded that it is erroneous or unreasonable. The full significance of this rule will require further consideration shortly. In the meantime it is necessary to state what classes of decisions are recognized by English law as absolutely, and what as merely conditionally, authoritative.

Absolute authority is attributed to the following kinds:—

(1) Every court is absolutely bound by the decisions of all courts superior to itself. A court of first instance cannot question a decision of the Court of Appeal, nor can the Court of Appeal refuse to follow the judgments of the House of Lords.

(2) The House of Lords is absolutely bound by its own decisions. 'A decision of this House once given upon a point of law is conclusive upon this House afterwards, and it is impossible to raise that question again as if it was *res integra* and could be re-argued, and so the House be asked to reverse its own decisions [2].'

(3) The Court of Appeal is, it would seem, absolutely bound by its own decisions and by those of older courts of co-ordinate authority, for example, the Court of Exchequer Chamber [3].

In all other cases save these three, it would seem that the authority of precedents is merely conditional. That is to say, in

[1] Persuasive efficacy, similar in kind though much less in degree, is attributed by our courts to the civil law and to the opinions of the commentators upon it; also to English and American text-books of the better sort.

[2] *London Street Tramways Company* v. *London County Council* [1898] A. C. 375, at p. 379.

[3] *Pledge* v. *Carr* [1895] 1 Ch. 51; *Lavy* v. *London County Council* [1895] 2 Q. B. at p. 581, per Lindley L.J.

all other cases a court is only conditionally bound by its own decisions, by the decisions of inferior, and by those of co-ordinate courts. It will be seen from these rules that the authority of a precedent depends not merely on the court from which it proceeds, but also on the court in which it is cited. Its authority may be absolute in one court, and merely conditional in another. A decision of the Court of Appeal is absolutely binding on a court of first instance, but is only conditionally binding upon the House of Lords.

In order that a court may be justified in disregarding a conditionally authoritative precedent, two conditions must be fulfilled. In the first place, the decision must in the opinion of the court in which it is cited be a *wrong* decision. A decision is wrong in two cases: first when it is contrary to law, and secondly when it is contrary to reason. It is wrong as contrary to law, when there is already in existence an established rule of law on the point in question, and the precedent fails to conform to it and accurately to express and apply it. We shall see later on that a precedent has no abrogative force. When the law is already settled, the sole right and duty of the judges is to follow it. A precedent *must* be declaratory whenever it *can* be, that is to say, whenever there is any law to declare. A decision which is wrong as being contrary to law is therefore one which is creative when it ought to have been merely declaratory.

But in the second place, a decision may be wrong as being contrary to reason. Where there is no settled law to declare and follow, the courts may make law for the occasion. In so doing it is their duty to follow reason, and so far as they fail to do so, their decisions are wrong, and the principles involved in them are of defective authority. Unreasonableness is one of the vices of a precedent, no less than of a custom and of certain forms of subordinate legislation.

It is not enough, however, that a decision should be contrary to law or reason. There is a second condition to be fulfilled before the courts are entitled to reject it. If the first condition were the only one, a conditionally authoritative precedent would differ in nothing from one which was merely persuasive. In each case the precedent would be effective only so far as its own intrinsic merits commended it to the minds of successive judges. But where a decision is authoritative, it is not enough that the court to which it is cited should be of opinion that it is wrong. It is necessary in innumerable cases to give effect to precedents notwithstanding such opinion. It does not follow that a precedent once established should be reversed simply because it is not

as perfect and rational as it ought to be. It is often more important that the law should be certain than that it should be ideally perfect. These two requirements are to a great extent inconsistent with each other, and we must often choose between them. Whenever a decision is departed from, the certainty of the law is sacrificed to its rational development. The evils of the uncertainty thus produced may far outweigh the very trifling benefit to be derived from the correction of the erroneous doctrine. The precedent, while it stood unreversed, may have been counted on in numerous cases as definitely establishing the law. Valuable property may have been dealt with in reliance on it. Important contracts may have been made on the strength of it. It may have become to any extent a basis of expectation and the ground of mutual dealings. Justice may therefore imperatively require that the decision, though founded in error, shall stand inviolate none the less. *Communis error facit jus*[1]. 'It is better,' said Lord Eldon, 'that the law should be certain than that every judge should speculate upon improvements in it[2].'

It follows from this that, other things being equal, a precedent acquires added authority from the lapse of time. The longer it has stood unquestioned and unreversed, the more harm in the way of uncertainty and the disappointment of reasonable expectations will result from its reversal. A decision which might be lawfully overruled without hesitation while yet new, may after the lapse of a number of years acquire such increased strength as to be practically of absolute and no longer of merely conditional authority. This effect of lapse of time has repeatedly received judicial recognition.

'Viewed simply as the decision of a court of first instance, the authority of this case, notwithstanding the respect due to the judges who decided it, is not binding upon us; but viewed in its character and practical results, it is one of a class of decisions which acquire a weight and effect beyond that which attaches to the relative position of the court from which they proceed. It constitutes an authority which, after it has stood for so long a period unchallenged, should not, in the interests of public convenience, and having regard to the protection of private rights, be overruled by this court except upon very special considerations. For twelve years and upwards the case has continued unshaken by any judicial decision or criticism[3].'

'When an old decided case has made the law on a particular

[1] It is to be remembered that the overruling of a precedent has a retrospective operation. In this respect it is very different from the repeal or alteration of a statute.

[2] *Sheddon* v. *Goodrich*, 8 Ves. 497.

[3] *Pugh* v. *Golden Valley Railway Company*, 15 Ch. D. at p. 334.

subject, the Court of Appeal ought not to interfere with it, because people have considered it as establishing the law and have acted upon it[1].'

The statement that a precedent gains in authority with age must be read subject to an important qualification. Up to a certain point a human being grows in strength as he grows in age; but this is true only within narrow limits. So with the authority of judicial decisions. A moderate lapse of time will give added vigour to a precedent, but after a still longer time the opposite effect may be produced, not indeed directly, but indirectly through the accidental conflict of the ancient and perhaps partially forgotten principle with later decisions. Without having been expressly overruled or intentionally departed from, it may become in course of time no longer really consistent with the course of judicial decision. In this way the tooth of time will eat away an ancient precedent, and gradually deprive it of all authority and validity. The law becomes animated by a different spirit and assumes a different course, and the older decisions become obsolete and inoperative.

To sum the matter up, we may say that to justify the disregard of a conditionally authoritative precedent, it must be erroneous, either in law or in reason, and the circumstances of the case must not be such as to make applicable the maxim, *Communis error facit jus*. The defective precedent must not, by the lapse of time or otherwise, have acquired such added authority as to give it a title to permanent recognition notwithstanding the vices of its origin.

The disregard of a precedent assumes two distinct forms. The court to which it is cited may either overrule it, or merely refuse to follow it. Overruling is an act of superior jurisdiction. A precedent overruled is definitely and formally deprived of all authority. It becomes null and void, like a repealed statute, and a new principle is authoritatively substituted for the old. A refusal to follow a precedent, on the other hand, is an act of co-ordinate, not of superior jurisdiction. Two courts of equal authority have no power to overrule each other's decisions. Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other. The legal antinomy thus produced must be solved by the act of a higher authority, which will in due time decide between the competing precedents, formally overruling one of them, and sanctioning the other as good law. In the meantime the matter remains at large, and the law uncertain.

[1] *Smith* v. *Keal*, 9 Q. B. D. at p. 352. See also *In re Wallis*, 25 Q. B. D. 180; *Queen* v. *Edwards*, 13 Q. B. D. 590; *Ridsdale* v. *Clifton*, 2 P. D. 306.

Precedents suppletory, not abrogative.—We have already seen the falsity of the theory that all precedents are declaratory. We have seen that they possess a distinct and legally recognized law-creating power. This power, however, is purely suppletory and in no degree abrogative. Judicial decisions may make law, but they cannot alter it. Where there is settled law already on any point, the duty of the judges is to apply it without question. They have no authority to substitute for it law of their own making. Their legislative power is strictly limited to supplying the vacancies of the legal system, to filling up with new law the gaps which exist in the old, to supplementing the imperfectly developed body of legal doctrine.

This statement, however, requires two qualifications. In the first place, it must be read subject to the undoubted power of the courts to overrule or disregard precedents in the manner already described. In its practical effect this is equivalent to the exercise of abrogative power. But in legal theory it is not so. The overruling of a precedent is not the abolition of an established rule of law. It is an authoritative denial that the supposed rule of law has ever existed. The precedent is so treated not because it has made bad law, but because it has never in reality made any law at all. It has not conformed to the requirements of legal efficacy. Hence it is that the overruling of a precedent, unlike the repeal of a statute, has retrospective operation. The decision is pronounced to have been bad *ab initio*. A repealed statute, on the contrary, remains valid and applicable as to matters arising before the date of its repeal. The overruling of a precedent is analogous not to the repeal of a statute, but to the judicial rejection of a custom as unreasonable or otherwise failing to conform to the requirements of customary law.

In the second place, the rule that a precedent has no abrogative power must be read subject to the maxim, *Quod fieri non debet, factum valeat*. It is quite true that judges ought to follow the existing law whenever there is any such law to follow. They are appointed to fulfil the law, not to subvert it. But if by inadvertence or otherwise this rule is broken through, and a precedent is established which conflicts with pre-existing law, it does not follow from this alone that such decision is destitute of legal efficacy. It is a well-known maxim of the law that a thing which ought not to have been done may nevertheless be valid when it is done. If, therefore, a precedent belongs to the class which is absolutely authoritative, it does not lose this authority simply because it is contrary to law and ought not to have been made. No court, for example, will be allowed to disregard a decision of the House of

Lords on such a ground; it must be followed without question, whether it is in harmony with prior law or not. So also with those which are merely conditionally authoritative. We have already seen that error is only one of two conditions, both of which are requisite to render allowable the disregard of such a precedent. And in this respect it makes no difference whether the error consists in a conflict with law or in a conflict with reason. It may well be better to adhere to the new law which should not have been made than to recur to the old law which should not have been displaced.

Grounds of the authority of precedents.—The operation of precedents is based on the legal presumption of the correctness of judicial decisions. It is an application of the maxim, *Res judicata pro veritate accipitur*. A matter once formally decided is decided once for all. The courts will listen to no allegation that they have been mistaken, nor will they reopen a matter once litigated and determined. That which has been delivered in judgment must be taken for established truth. For in all probability it is true in fact, and even if not, it is expedient that it should be held as true none the less. *Expedit reipublicae ut sit finis litium*. When therefore a question has once been judicially considered and answered, it must be answered in the same way in all subsequent cases in which the same question again arises. Only through this rule can that consistency of judicial decision be obtained, which is essential to the proper administration of justice. Hence the effect of judicial decisions in excluding the *arbitrium judicis* for the future, in providing predetermined answers for the questions calling for consideration in future cases, and therefore in establishing new principles of law.

The questions to which judicial answers are required are either questions of law or of fact. To both kinds the maxim, *Res judicata pro veritate accipitur*, is applicable. In the case of questions of law, this maxim means that the court is presumed to have correctly ascertained and applied the appropriate legal principle. The decision operates therefore as proof of the law. It is, or at all events is taken to be, a declaratory precedent. If the law so declared is at all doubtful, the precedent will be worth preserving as useful evidence of it. But if the law is already clear and certain, the precedent will be useless; to preserve it would needlessly cumber the books of reports, and it will be allowed to lapse into oblivion.

In the case of questions of fact, on the other hand, the presumption of the correctness of judicial decisions results in the creation of new law, not in the declaration and proof of old. The decision

becomes, in a large class of cases, a creative precedent. That is to say, the question thus answered ceases to be one of fact, and becomes for the future one of law. For the courts are now provided with a predetermined answer to it, and it is no longer a matter of free judicial discretion. The *arbitrium judicis* is now excluded by one of those fixed and authoritative principles which constitute the law.

For example, the meaning of an ambiguous statute is at first a pure question of fact. When for the first time the question arises whether the word 'cattle' as used by the statute includes horses, the court is bound by no authority to determine the matter in one way or the other. The occasion is one for the exercise of common sense and interpretative skill. But when it has once been judicially decided that 'cattle' does include horses, the question is for the future one of law and no longer one of fact. For it is incumbent on the courts in subsequent cases to act on the maxim, *Res judicata pro veritate accipitur*, and to answer the question in the same way as has been done already[1].

The operation of creative precedents is, therefore, the progressive transformation of questions of fact into questions of law. *Ex facto oritur jus.* The growth of case law involves the gradual elimination of that judicial liberty to which it owes its origin. In any system in which precedents are authoritative the courts are engaged in forging fetters for their own feet. There is of course a limit to this process. It is absurd to suppose that the final result of legal development will be the complete transformation of all questions of fact into questions of law. The distinction between law and fact is permanent and essential. What then is the limit? To what extent is precedent capable of effecting this absorption of fact into law?

Rationes decidendi.—In respect of this law-creating operation of precedents, questions of fact are divisible into two classes. For

[1] It will be understood that the word *fact* is here used in a wide sense to include everything which is not *law*. A question of law means one which is to be answered in accordance with a fixed and predetermined principle authoritatively established, and excluding the liberty of judges to answer the question at their own free will. All others are questions of fact in the wide sense which is here adopted, and which indeed *must* be adopted if the distinction between questions of law and those of fact is to be regarded as logically exhaustive. Every question, therefore, in which the *arbitrium judicis* is not excluded by any authoritative and binding principle, is a question of fact in this sense, whether it is, or is not, one of fact in one or other of the narrower uses of this equivocal term.

The statement in the text that the meaning of an ambiguous statute is a question of fact, may seem paradoxical at first sight. It is, indeed, a question of law in that loose and illogical sense in which every question for the court, as opposed to the jury, is one of law. And it is also, of course, a question as to what the law is. But a question of law does not mean one as to *what the law is*, but one which must be answered by the courts *in accordance with a rule of law*.

some of them do, and some do not, admit of being answered *on principle*. The former are those the answer to which is capable of assuming the form of a general principle. The latter are those the answer to which is necessarily specific. The former are answered by way of abstraction, that is to say by the elimination of the immaterial elements in the particular case, the result being a general rule applicable not merely to that single case but to all others which resemble it in its essential features. The other class of questions consists of those in which no such process of abstraction, no such elimination of immaterial elements, as will give rise to a general principle, is possible. The answer to them is based on the total circumstances of the concrete and individual case, and therefore produces no rule of general application. Now the operation of precedent is limited to one only of these classes of questions. Judicial decisions are a source of law only in the case of those questions of fact which admit of being answered on principle. These only are transformed by decision into questions of law. For in this case only does the judicial decision give rise to a rule which can be adopted for the future as a rule of law. Those questions which belong to the other class are permanently questions of fact. Their judicial solution leaves behind it no permanent results in the form of legal principles.

For example, the question whether the defendant did or did not make a certain statement is a question of fact, which does not admit of any answer save one which is concrete and individual. It cannot be answered on principle. It necessarily remains, therefore, a pure question of fact; the decision of it is no precedent, and establishes no rule of law. On the other hand, the question whether the defendant in making such a statement was or was not guilty of fraud or negligence, though it may be equally a question of fact, nevertheless belongs to the other class of such questions. It may well be possible to lay down a general principle on a matter such as this. For it is a matter which may be dealt with *in abstracto*, not necessarily *in concreto*. If, therefore, the decision is arrived at on principle, it will amount to a creative precedent, and the question, together with every other essentially resembling it, will become for the future a question of law, predetermined by the rule thus established.

A precedent, therefore, is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi*. The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large. 'The only use of authorities or decided cases,'

says Sir George Jessel, 'is the establishment of some principle, which the judge can follow out in deciding the case before him [1].' 'The only thing,' says the same distinguished judge in another case, 'in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided [2].'

This is the true significance of the familiar contrast between authority and principle. It is often said by judges that inasmuch as the matter before them is not covered by authority, they must decide it upon principle. The statement is a sure indication of the impending establishment of a creative precedent. It implies two things: first, that where there is any authority on the point, that is to say, where the question is already one of law, the duty of the judge is simply to follow the path so marked out for him; and secondly, that if there is no authority, and if, therefore, the question is one of pure fact, it is his duty if possible to decide it upon principle, that is to say, to formulate some general rule and to act upon it, thereby creating law for the future. It may be, however, that the question is one which does not admit of being answered either on authority or on principle, and in such a case a specific or individual answer is alone possible, no rule of law being either applied or created [3].

To avoid misapprehension, it may be advisable to point out that decisions as to the meaning of statutes are always general, and therefore establish precedents and make law. For such interpretative decisions are necessarily as general as the statutory provisions interpreted. A question of statutory interpretation is one of fact to begin with, and is decided on principle; therefore it becomes one of law, and is for the future decided on authority.

Judicial dicta.—Although it is the duty of courts of justice to decide questions of fact on principle if they can, they must take care in such formulation of principles to limit themselves to the requirements of the case in hand. That is to say, they must not lay down principles which are not required for the due decision of the particular case, or which are wider than is necessary for this purpose. The only judicial principles which are authoritative are those which are thus relevant in their subject-matter and limited in their scope. All others, at the best, are of merely persuasive efficacy. They are not true *rationes decidendi*, and are distinguished from them under the name of *dicta* or *obiter dicta*, things said by the way. The prerogative of judges is not to make law by formulating and

[1] *In re Hallett*, 13 Ch. D. at p. 712.
[2] *Osborne* v. *Rowlett*, 13 Ch. D. at p. 785.
[3] It is clearly somewhat awkward to contrast in this way the terms authority and principle. It is odd to speak of deciding a case on principle because there is no legal principle on which it can be decided.

declaring it—this pertains to the legislature—but to make law by applying it. Judicial declaration, unaccompanied by judicial application, is of no authority.

The sources of judicial principles.—Whence then do the courts derive those new principles, or *rationes decidendi*, by which they supplement the existing law? They are in truth nothing else than the principles of natural justice, practical expediency, and common sense. Judges are appointed to administer justice—justice according to law, so far as the law extends, but so far as there is no law, then justice according to nature. Where the civil law is deficient, the law of nature takes its place, and in so doing puts on its character also. But the rules of natural justice are not always such that he who runs may read them, and the light of nature is often but an uncertain guide. Instead of trusting to their own unguided instincts in formulating the rules of right and reason, the courts are therefore wisely in the habit of seeking guidance and assistance elsewhere. In establishing new principles, they willingly submit themselves to those various persuasive influences which, though destitute of legal authority, have a good claim to respect and consideration. They accept a principle, for example, because they find it already embodied in some system of foreign law. For since it is so sanctioned and authenticated, it is presumably a just and reasonable one. In like manner the courts give credence to persuasive precedents, to judicial *dicta*, to the opinions of text-writers, and to any other forms of ethical or juridical doctrine which seem good to them. There is, however, one source of judicial principles which is of special importance, and calls for special notice. This is the analogy of pre-existing law. New rules are very often merely analogical extensions of the old. The courts seek as far as possible to make the new law the embodiment and expression of the spirit of the old—of the *ratio juris*, as the Romans called it. The whole thereby becomes a single and self-consistent body of legal doctrine, containing within itself an element of unity and of harmonious development. At the same time it must be remembered that analogy is lawfully followed only as a guide to the rules of natural justice. It has no independent claim to recognition. Wherever justice so requires, it is the duty of the courts, in making new law, to depart from the *ratio juris antiqui*, rather than servilely to follow it.

It is surprising how seldom we find in judicial utterances any explicit recognition of the fact that in deciding questions on principle, the courts are in reality searching out the rules and requirements of natural justice and public policy. The measure of the prevalence of such ethical over purely technical consider-

ations is the measure in which case law develops into a rational and tolerable system as opposed to an unreasoned product of authority and routine. Yet the official utterances of the law contain no adequate acknowledgment of this dependence on ethical influences. 'The very considerations,' it has been well said, 'which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life[1].' The chief reason of this peculiarity is doubtless to be found in the fictitious declaratory theory of precedent, and in the forms of judicial expression and reasoning which such theory has made traditional. So long as judges affect to be looking for and declaring old law, they cannot adequately express the principles on which they are in reality making new.

The respective functions of judges and juries.—The division of judicial functions between judge and jury creates a difficulty in the theory of precedent which requires some consideration. It is commonly said that all questions of fact are for the jury, and all questions of law for the judge. But we have already seen that creative precedents are answers to questions of fact, transforming them for the future into questions of law. Are such precedents then made by juries instead of by judges? It is clear that they neither are nor can be. No jury ever answers a question on principle; it gives decisions, but no reasons; it decides *in concreto*, not *in abstracto*. In these respects the judicial action of juries differs fundamentally from that of judges. The latter decide on principle, whenever this is possible; they formulate the *ratio decidendi* which underlies their decision; they strive after the general and the abstract, instead of adhering to the concrete and the individual. Hence it is that the decision of a judge may constitute a precedent, while that of a jury cannot. But in composite tribunals, where the jury decides the facts and the judge the law, how does the judge obtain any opportunity of establishing precedents and creating new law? If the matter is already governed by law, it will of course fall within his province; but if it is not already so governed, is it not a pure question of fact which must be submitted to the jury, to the total destruction of all opportunity of establishing any precedent in respect of it? The truth of the matter is that, although all questions of law are for the judge, it is very far from being true that all questions of fact are for the jury. There are very extensive and important portions of the sphere of fact which fall within the jurisdiction of the judge. It is within these portions that the law-creating operation of judicial decisions takes place. No jury, for example, is ever asked to interpret a statute or, speaking

[1] Holmes, The Common Law, p. 35.

generally, any other written document. Yet unless there is already some authoritative construction in existence, this is pure matter of fact. Hence that great department of case law which has its origin in the judicial interpretation of statute law. The general rule—consistently acted on, though seldom expressly acknowledged—is that a judge will not submit to a jury any question which he is himself capable of answering *on principle*. Such a question he answers for himself. For since it can be answered on principle, it provides a fit occasion for the establishment of a precedent and a new rule of law. It *ought* to be a matter of law, and can only become what it ought to be, by being kept from the jury and answered *in abstracto* by the judge. The only questions which go to a jury are those questions of fact which admit of no principle, and are therefore the appropriate subject-matter for those concrete and unreasoned decisions which juries give.

I have said that this rule, though acted on, is not expressly acknowledged. The reason is that judges are enabled to avoid such acknowledgment through recourse to the declaratory theory of precedent. As between judge and jury this theory is still in full force and effect, although when the rights and privileges of juries are not concerned, the courts are ready enough at the present day to acknowledge the essential truth of the matter. As between judge and jury, questions of fact are withdrawn from the exclusive cognizance of the latter by means of the legal fiction that they are already questions of law. They are treated as being already that which they are about to become. In a completely developed legal system they would be already true questions of law; the principle for their decision would have been already authoritatively determined. Therefore the judges make bold to deal with them as being already that which they ought to be, and thus the making of law by way of precedent is prevented from openly infringing upon the rights of juries to decide all questions which have not been already decided by the law.

JOHN W. SALMOND.

ENGLISH JUDGES AND HINDU LAW.

(CONCLUDING PAPER.)

AS the tribunal known as the Judicial Committee of the Privy Council is attracting considerable attention at the present moment, a little sketch of its history will be interesting and, perhaps, instructive.

The Judicial Committee of the Privy Council was formed in 1833 by Act of Parliament, 3 & 4 Wm. IV, c. 41. By s. 1 the members of the Privy Council who held or had held the offices of President of the Council, Lord Chancellor, Lord Keeper, or First Commissioner of the Great Seal of Great Britain, and those members who were or had been judges of either of the Superior Courts of Law or Equity in England, together with any other two members of the Privy Council who might be appointed for the purpose by the Crown, were formed into a committee to be called the Judicial Committee of the Privy Council, to be a tribunal to hear appeals to His Majesty in Council from the Courts of Admiralty, and the various courts in the East Indies and the plantations, colonies, and other dominions of the Crown abroad, from which an appeal lay to the King in Council, and to report and make recommendations thereon to His Majesty.

By s. 5 the Committee were prohibited from making any report or recommendation unless four members of the Committee were present; and by the same section power was reserved to the Crown to summon any other members of the Privy Council to attend the meetings of the committee.

S. 30 provided that two sums of £400 a year each, out of the consolidated fund, might be paid to two privy councillors, who had been Indian or colonial judges, who might, on the appointment of the Crown, attend the sittings of the Committee.

Persons who attended the sittings of the Committee either under the power reserved by the latter part of s. 5 or under the provisions of s. 30 were not members of the Committee, and could not, of course, be reckoned in order to make up the number of four members required by the first part of s. 5.

By an Act passed in 1844, 7 & 8 Vict. c. 49, the jurisdiction and powers of the Judicial Committee were extended, but its composition was not changed.

On February 3, 1844, Mr. T. Pemberton Leigh, an English

lawyer, was appointed a member of the Committee, without pay, under the last clause of the first section of the Act of 1833. He was afterwards created Lord Kingsdown, and remained an active member of the Committee until 1865.

On March 9, 1850, Sir Edward Ryan, who had been Chief Justice of the old Supreme Court at Calcutta, was appointed either under the last clause of s. 1 or under s. 30.

By an Act passed in 1851, 14 & 15 Vict. c. 83, a Court of Appeal in Chancery was created, and by s. 15 its judges were, if privy councillors, made members of the Judicial Committee.

On November 23, 1865, Sir Edward Ryan resigned, and Sir James Colvile, who had also been Chief Justice of the Supreme Court at Calcutta, was appointed to attend the sittings of the Committee under s. 30 of the Act of 1833.

Sir Lawrence Peel was on June 23, 1858, appointed to attend the sittings of the Committee under the same section, and did so until December 1, 1874. Lord Kingsdown continued to attend the sittings of the Committee until the summer of 1865. He died in 1867.

On February 2, 1869, Sir Joseph Napier, who had been Lord Chancellor of Ireland, was appointed a member of the Committee under s. 1 of the Act of 1833.

On August 21, 1871, Her Majesty was, by statute 34 & 35 Vict. c. 91, s. 1, empowered to appoint, within twelve months, four persons who were or had been judges of one of the Superior Courts of Law or Equity in England, or a Chief Justice of Bengal, Madras, or Bombay, to act as members of the Judicial Committee at salaries of £5,000 a year each, and to fill up any vacancies in their offices which might occur within two years. Under this Act Sir Montague Smith and Sir Robert Collier, who had been judges of the Court of Common Pleas in England, Sir Barnes Peacock, who had been legal member of the Viceroy's Council and the first Chief Justice of Bengal, and Sir James Colvile, were appointed to act as members of the Judicial Committee.

On November 24, 1871, Sir Mountague Bernard, the first Chichele Professor of international law at Oxford, was appointed an unpaid member of the Committee under s. 1 of the Act of 1833.

In 1876, by the Appellate Jurisdiction Act, 1876, 39 & 40 Vict. c. 59, Her Majesty was empowered to appoint four Lords of Appeal in Ordinary, who should aid the House of Lords in the hearing of appeals, and who should also, if privy councillors, be members of the Judicial Committee, and, subject to the due performance of their duties as Lords of Appeal in Ordinary, should sit and act as members of the Judicial Committee.

At the time when this Act was passed the time within which any further appointment to the Judicial Committee could have been made under the Act of 1871 had expired.

S. 14 of the Act of 1876 provided for the attendance at the Committee of such archbishops and bishops as were privy councillors as assessors on the hearing of ecclesiastical cases.

S. 5 provides that an appeal shall not be heard by the House of Lords unless three persons who answer to certain descriptions are present. Among such persons are such peers of Parliament as are for the time being holding, or have held, any of the offices in the Act described as high judicial office; and by s. 25 'high judicial office' includes, *inter alia*, the office of a paid judge of the Judicial Committee of the Privy Council. No Indian or colonial expert has ever been appointed under this Act, and the four appointments are now held by one Scottish and three English lawyers.

At the end of 1880 Sir James Colvile died, and early in 1881 Sir Mountague Bernard and Sir Joseph Napier resigned.

On January 21, 1881, Sir Richard Couch, who had been Chief Justice of Bengal, was appointed an unpaid member of the Committee under s. 1 of the Act of 1833; and on March 2, 1881, Sir Arthur Hobhouse, an English barrister who had been legal member of the Viceroy's Council in India, was also appointed an unpaid member under the same section.

In 1881, by 44 Vict. c. 3, s. 1, every person who held or had held the office of a Lord Justice of Appeal was, if a member of the Privy Council of England, made a member of the Judicial Committee.

In 1887, by the Act 50 & 51 Vict. c. 70, s. 4, any person who should attend the sittings of the Judicial Committee under s. 30 of the Act of 1833 was made a member of the Committee for all purposes, and when there was only one, such person was to be entitled to receive the whole of the sum provided by that section, that is to say £800 a year; and by s. 5 the expression 'high judicial office,' for the purposes of the Act of 1876, was made to include the office of any member of the Judicial Committee of the Privy Council. After the passing of this Act Sir Richard Couch resigned his original appointment, and was reappointed under s. 30 of the Act of 1833 and s. 4 of the Act of 1887.

Sir Barnes Peacock died in 1894.

In 1895 colonial judges, to the number of five, were by 58 & 59 Vict. c. 44, s. 1, if privy councillors, added to the Committee. Under this Act Sir Henry Strong (Canada), Sir Henry De Villiers (Cape Colony), and Sir Samuel Way (Australia) are now members of the Committee.

On February 13, 1896, Lord James of Hereford was appointed

an unpaid member of the Committee under the last clause of s. 1 of the Act of 1833.

The fluctuation of opinion as to what amount of Indian and colonial experience or information should be available for the purpose of the Committee has been remarkable. For thirty-eight years, from 1833 to 1871, two paid assessors who had been Indian or colonial judges were provided for, and it is worthy of note that during that time the reputation of the Judicial Committee rose to its greatest height in India, and gained the entire confidence of the Indian people. It is true that during some of those years Lord Kingsdown, who was a really great judge, took a very active part in the hearing and decision of Indian cases, and showed a serious and sympathetic interest in Indian laws and customs; but he had the assistance of Sir Edward Ryan, Sir James Colvile, and Sir Lawrence Peel as assessors, and it may be that the provision that Indian or colonial judges should attend the meetings of the Committee, not as judges but as assessors, was more wise and foreseeing than it has appeared to later legislators. Both Hindu and Mohammedan law may be roughly described as consisting of the precepts of the sages as interpreted by the customs of the people, and every one who has had experience of India knows that instances constantly occur where it is difficult, if not impossible, to ascertain from books what the customs of the people in some particulars are. In India English judges can consult their Hindu or Mussulman colleagues, and those who are members of the Civil Service have themselves had large experience of the people and their customs; but a judge in England is very differently situated, and from his position as a judge is precluded from himself making inquiries which an assessor, whose only duty was to inform the judge, might make without loss of dignity.

In 1871 the policy of appointing assessors was abandoned in favour of making the Indian experts members of the Committee, and Sir James Colvile and Sir Barnes Peacock obtained seats on the Committee at salaries of £5,000 a year. This system lasted for five years, until 1876, when it was swept away by the Appellate Jurisdiction Act. Upon the death of Sir James Colvile in 1880 it appears to have been thought necessary to add another Indian expert, and Sir Richard Couch was made an unpaid member, and so continued until 1887, when assessors were abolished by statute, and he became entitled to a salary of £800. Since the death of Sir Barnes Peacock he has been the only Indian expert available, and has alone performed the duties which had been at various times and in different capacities performed by Sir Edward Ryan, Sir James Colvile, Sir Lawrence Peel, and Sir Barnes Peacock.

If the story of the past furnishes any guide for the future, it would appear that ambitious or heroic measures are neither necessary nor desirable as far as India is concerned. If the fourth section of the Act of 1887 were repealed and two assessors were appointed under s. 30 of the Act of 1833, and if, at the same time, it were arranged that the same one of the Lords of Appeal, Lord Lindley, for instance, should always take part in the hearing of Indian appeals, the conditions which existed from 1844 to 1865 would be very nearly reproduced. But at the same time it must not be forgotten that there are some decisions of the Judicial Committee which have caused and are causing great dissatisfaction and considerable distress in India, and it seems probable that confidence in the tribunal can never be re-established among the natives of India until those decisions have been reversed in some way, and the law of the courts again brought into accordance with the law of the people.

W. C. PETHERAM.

TRADING WITH THE ENEMY.

THE rule that, when one State is at war with another, all the subjects of the one are considered to be at war with all the subjects of the other, and that all intercourse and trade with the enemy is forbidden, is not peculiar to our own jurisprudence. In the leading case of *The Hoop* (1799) 1 C. Rob. 196, Sir William Scott (afterwards Lord Stowell) said:—

'In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all subjects trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek (Qu. Jur. Pub., lib. 1, c. 3) as an universal principle of law—"ex naturâ belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsae indicationes bellorum satis declarant." ... It appears from these passages to have been the law of Holland; Valin (l. iii. tit. 6, art. 3) states it to have been the law of France . . .: it will appear from a case which I shall have occasion to mention (*The Fortuna*) to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general law in most of the countries of Europe.'

Nor was the principle new to the law of England. Although *The Hoop* may be regarded as the leading case, Sir William Scott in his judgment reviews a series of cases from the year 1747 onwards, in which the same principle had been recognized and acted upon by the Courts.

The principle has also been accepted in the United States. Thus, for instance, Wheaton, in his Elements of International Law (§ 309), says:—

'One of the immediate consequences of the commencement of hostilities is, the interdiction of all commercial intercourse between the subjects of the States at war, without the license of their respective Governments.'

And Kent (Commentaries, vol. i. p. 66) affirms the same view:—

'One of the immediate and important consequences of a declaration of war, is the absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing between the subjects of the two countries. The idea that any commercial intercourse, or pacific dealing, can lawfully subsist between the peoples

of the powers at war, except under the clear and express sanction of the Government, and without a special license, is utterly inconsistent with the new class of duties growing out of a state of war. The interdiction flows necessarily from the principle already stated, that a state of war puts all the members of the two nations respectively in hostility to each other; and to suffer individuals to carry on a friendly or commercial intercourse, while the two Governments were at war, would be placing the act of government and the acts of individuals in contradiction to each other. It would counteract the operations of war, and throw obstacles in the way of public efforts, and lead to disorder, imbecility (*sic*), and treason.'

In connexion with these observations, it may be remarked that a further reason for the rule that 'a declaration of war is equal to an Act of Parliament prohibiting intercourse with the enemy except by the Queen's license,' is succinctly given by Willes J., in delivering the judgment of the Court of Exchequer Chamber in the case of *Esposito* v. *Bowden* (1857) 7 E. & B. 763, at p. 779:—

'It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is illegal.'

The penalty for such illegal trading is forfeiture. Any goods which British subjects are trading with the enemy are liable to be confiscated, and any British ship which is found engaged in trade with the enemy is similarly liable. The latter is, of course, the more important instance, and it may not be out of place to quote the instructions which are given to the Commanders of British men-of-war in the Admiralty Manual of Prize Law, 1888 (§ 38):—

'The Commander should detain any British Vessel which he may meet with trading with the Enemy, unless either:

'(1) He is satisfied that the Master was pursuing such trade in ignorance that war had broken out, or

'(2) The Vessel is pursuing such trade under a License from the British Government.'

The first of these exceptions covers more particularly those cases in which the vessel has sailed on her voyage before the commencement of hostilities. This exception is founded on a very obvious ground, and the case upon which it rests is *The Abby* (1804) 5 C. Rob. 251. *The Abby* was a British vessel which had sailed from Liverpool to the coast of Africa 'there to barter her cargo for slaves, and then to carry them to . . . Demerara, at that time a Dutch colony. The vessel sailed on the 11th of September, 1795. At that time, and until the declaration of hostilities, which issued on the 16th

of that month, Demerara could not be considered a colony of the enemy' . . . so that at the time of the vessel's sailing the trading was not illegal. 'The vessel sailed from the coast of Africa, in May, 1796, and was taken off the island of Demerara, after the surrender of that place to the British forces, and carried to Martinique'—then a British possession. After various proceedings had been taken, the case came before Sir William Scott in the High Court of Admiralty; he held the ship to be free from the charge of illegal trading, and made an order of restoration. There had, he considered, been neither the act nor the intention of trading with the enemy—not the act, because at the time of the importation, Demerara had been taken by the British; not the intention, because when the vessel sailed, hostilities had not broken out.

'No case,' said Sir William Scott, 'has been produced in which a mere *intention* to trade with the enemy's country, contradicted by the fact of its not being an enemy's country, has enured to condemnation. Where a country is known to be hostile, the commencement of a voyage towards that country may be a sufficient act of illegality; but where the voyage is undertaken without that knowledge, the subsequent event of hostility will have no such effect.'

The case of the second exception—trading with a license from the Government—was fully considered by the same eminent judge in the case of *The Hoop*, 1 C. Rob. 196, to which reference has already been made. He quoted Bynkershoek (Qu. Jur. Pub., lib. 1, c. 3) as saying that sometimes the strict rule which forbids all trading with an enemy has been modified by exceptions, and that different species of traffic have been from time to time permitted; but that in every case it has been the act and permission of the sovereign:—

'By the law and constitution of this country, the sovereign alone has the power of declaring war or peace—He alone, therefore, who has the power of removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interests of the State. It is for the State alone, on more enlarged views of policy, and on consideration of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Who can be

insensible to the consequences that might follow if every person in time of war had a right to carry on commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them, if necessary, under the eye and control of the Government, charged with the care of the public safety?'

The case of *The Hoop*, it must be admitted, was rather a hard one, as the merchants had been for some time engaged in the trade; they had had the Royal License for previous ventures during the war, and, before this vessel sailed, they had applied to the Commissioners of Customs at Glasgow to know whether, in view of certain recently passed Acts, it was necessary to obtain a license for this voyage, and had been informed that, in the opinion of the law advisers of the Commissioners, such a license was not necessary. But Sir William Scott held in favour of the capture, and declined to make an order of restitution:—

'It appears,' said he, 'that these parties had before applied to the Council for special orders, and had always obtained them. It is much to be regretted that they had not applied again to the same source of information. . . . The intention of the parties might be perfectly innocent; but there is still the fact against them of the actual contravention of the law, which no innocence of intention can do away.'

Thus, if the vessel is, in fact, trading with the enemy, she will not be protected by innocence of intention. But innocence of intention, as shown by various actions, may have an important bearing on the question whether, in fact, she is trading with the enemy. In the case of *The Mercurius* (1808) Edwards, 53, a ship under Bremen colours, at the time of capture was proceeding with a cargo of brandies on a voyage from Bordeaux to Bremen, but with directions to put into a British port for the purpose of obtaining a license from the British Government. The court had every reason to believe that there was an honest intention to come to this country to procure the license, and to act conformably with it when granted.

'The parties have acted throughout *aperto voto*,' said Sir William Scott; 'there is nothing to lead to a suspicion of disingenuous conduct. Then the question comes to this, whether such a voyage intended ultimately to Bremen, but first to this country, for the purpose of obtaining a license, without which it was to be relinquished, is a continuous voyage, and therefore illegal? I think clearly not: it is a contingent voyage, depending upon the determination, not of the parties themselves, but of the British Govern-

ment; if the ship went on at all, it was to be the act of the British Government.'

On this ground, that the voyage was not continuous but contingent, he pronounced for restoration. And it may be observed that a similar decision had been given in the previous year in the somewhat similar case of *The Minna* (1807) Edwards, 55, *n.*, which had been captured on a voyage from Bordeaux destined ultimately to Bremen, but with orders to touch at a British port, from whence she was to resume her voyage, if permitted.

How strict is the rule that, in order to legalize trading with the enemy, there must be a license from the Crown, is illustrated by the decision in *The Hoop* already referred to, and also by the decision in *The Carlotta* (1814) 1 Dods. 387.

'There is,' said Sir William Scott in the latter case, 'no principle of law more recognized than this, that during the existence of hostilities between the Crown of Great Britain and other countries, it is unlawful for British subjects to carry on a commercial intercourse with the inhabitants of those countries. The consent of the Crown to such a course of trade must necessarily be interposed in some way or other. The particular mode in which the consent may be expressed is not material. It may be signified in a variety of ways—by a license granted to the individual for the special occasion, by an Order in Council, by Proclamation, or under the authority of an Act of Parliament, to which the Crown is necessarily a party.'

He held, however, that a certain proclamation by the Lord Lieutenant of Ireland, under which the transaction was attempted to be justified, was not relevant, and condemned the property; at the same time commending the case, on its merits, to the equitable consideration of the Government.

Where a license has been granted, the Court will not, of course, extend the terms of it. Thus, for instance, where a license to the port of an enemy had been granted for certain enumerated articles, and other articles not enumerated were sent at the same time, it was held by Sir William Scott in *The Vriendschap* (1801) 4 C. Rob. 96, that those other goods were liable to condemnation, notwithstanding the fact that their ulterior destination was a neutral port. But, on the other hand, the license will be liberally interpreted. This was illustrated by the decision in *The Vrow Cornelia* (1810) Edwards, 349. In that case a license had been granted for the importation from France of a cargo of brandy, which for convenience was shipped from Bordeaux, not on one vessel, but on two. One of these vessels carried the original license, and the other an attested copy. The latter vessel was captured by British cruisers,

and brought in for adjudication. But Sir William Scott pronounced against the captors:—

'In the use and application of licenses,' said he, 'the Court will not limit the parties to a literal construction. It is sufficient that they show under the difficulties of commerce that they come as near as they can to the terms of the license; and where that is done, the Court will not prevent them from having the entire benefit intended by His Majesty's Government. If I did not adopt this rule, I should inflict a severe wound upon British commerce, than which nothing can be further from my inclination; and if the cruisers expect a more rigid construction of licenses from me, they will find themselves disappointed. Wherever I am satisfied that there is no bad faith in the parties, and no undue extension of the terms of a license beyond the meaning of the Council Board, any little informalities, or trifling deviations, shall not injure them.'

Passing from the trading itself to the ancillary contract of insurance, it is to be observed that the legality of the insurance depends on the legality of the trade. Since unlicensed trading with the enemy is illegal, no action can be maintained on a policy entered into with respect to it—this rule was firmly established in the case of *Potts* v. *Bell* (1800) 8 T. R. 548. Conversely, the effect of the license, when granted, is not only to protect ship and cargo, but also to legalize the trading so as to make it a proper subject for insurance, and to enable an action to be brought on the policy. This was put beyond doubt by the decisions of Lord Ellenborough C. J. in *Barker* v. *Blades* (1808) 9 East, 283, and in the leading case of *Usparicha* v. *Noble* (1811) 13 East, 332. In the latter case Lord Ellenborough said:—

'The legal result of the license granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our courts of law, but that the commerce itself is to be regarded as legalized for all purposes of its due and effectual prosecution. To hold otherwise would be to maintain a proposition repugnant to national good faith and the honour of the Crown. The Crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war: and its license for such purpose ought to receive the most liberal construction.'

That they did receive such a construction is evident from a series of decisions, of which may be taken as instances *Feise* v. *Newnham* (1812) 16 East, 197; *De Tastet* v. *Taylor* (1812) 4 Taunt. 233; and *Flindt* v. *Scott* (1814) 5 Taunt. 674. In the same connexion may be mentioned the earlier case of *Kensington* v. *Inglis* (1807) 8 East, 273, which was heard in error, and in which Lord

Ellenborough C. J., delivering the judgment of the Court, held that a license granted for trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships, into our colonial ports, incidentally legalized an insurance not only on the specie and goods, but also on the enemy's ship which carried them. While the cases of *Pieschell* v. *Allnutt* (1813) 4 Taunt. 792, and *Butler* v. *Allnutt* (1816) 1 Stark. 222, show that the carrying of articles not named in the license will not invalidate an insurance upon the licensed articles which are carried.

Coming back to the general rule which prohibits trading with the enemy, it may be observed that in the leading case of *Esposito* v. *Bowden* (1857) 7 E. & B. 763, it was held that, since it was forbidden to a British subject to trade with the enemy, the declaration of war made it illegal to ship a cargo from an enemy's port, even on board a neutral vessel, and so put an end to a contract of affreightment which had been made before that declaration but remained to be executed afterwards. In that case Willes J., delivering the judgment of the Court, quoted what Lord Tenterden had written, nearly fifty years before, on the subject of the dissolution of contract:—

'Another general rule of law furnishes a dissolution of these contracts (i. e. for the carriage of goods in merchant ships) by matter extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the State to which the ship or cargo belongs, and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end, the merchant must unlade his goods, and the owners find another employment for their ship' (see Abbott on Shipping, 13th ed., at p. 754).

The prohibition of trading with the enemy extends even to the case of bills of exchange. In the case of *Willison* v. *Patteson* (1817) 7 Taunt. 439, the defendants were British merchants in London, who had in their hands some property belonging to one Michelon, a French subject. France was then at war with the United Kingdom; during that war Michelon drew bills on the defendants, and the defendants accepted them. These bills were then endorsed to the plaintiff, who was an English-born subject residing in France. After the close of the war, when peace had been restored, an action was brought upon the bills, but it was held that no such action would lie, as the bills were contracts with an alien enemy, and therefore void from the first. In contrast with this should be

mentioned the case of *Antoine* v. *Morshead* (1815) 6 Taunt. 237. That was an action upon bills of exchange which had been drawn in France by a British subject who was a prisoner there, in favour of another British subject who was also detained there. The latter endorsed them to a French subject, who, after the close of the war, sued upon them. It was contended that the French subject could not recover; but the Court held otherwise, as the bills were not contracts with an alien enemy, but contracts between British subjects in the enemy's country, and 'the endorsement to the plaintiff conveyed to him a legal title in this bill, on which the king might have sued in the time of the war, and he, not having so done, the plaintiff might sue after peace was proclaimed.'

With reference to the latter point, that the right of an alien by contract which is not in itself illegal is only suspended by a war, and may be enforced upon the restoration of peace, the case of *ex parte Boussmaker* (1806) 13 Vesey, 71, may also be mentioned. In that case a petition had been brought to prove a debt under a commission of bankruptcy, which the commissioners refused to admit, on the ground that the creditors applying were alien enemies. But the Lord Chancellor (Lord Erskine) pronounced that the claim should be entered, and the dividend reserved. 'If,' said he, 'this had been a debt arising from a contract with an alien enemy, it could not possibly stand; for the contract would be void. But, if the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue: but, the contract being originally good, upon the return of peace the right would survive.' And it may be mentioned that in each of the recent cases of *Driefontein Consolidated Gold Mines* v. *Janson*, and *West Rand Central Gold Mines Co.* v. *De Rougemont* [1900] 2 Q. B. 339—see the judgment of Mathew J. at p. 343—it had been agreed by the parties that no dilatory plea should be set up, based upon the fact that the plaintiff company was an alien, and could not sue while the war lasted.

To the subjects of an enemy State, who are in this country, our laws have always been generous. Thus, for instance, there is, we find, the provision (§ xxx) in Magna Charta:—

'All merchants, if they were not openly prohibited before, shall have their safe and sure conduct to depart out of England, to come into England, to tarry in, and go through England, as well by land as by water, to buy and sell without any manner of evil tolles, by the old and rightful customs, except in time of war; *and if they be of a land making war against us, and be found in our realm at the beginning of the wars, they shall be attached without harm of body or goods, until it be known unto us, or our chief justice, how our merchants be entreated*

who are then found in the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us.'

A similar spirit characterizes the various decisions. One of the earliest reported is that in *Wells* v. *Williams* (Lord Raymond, 282), decided in the year 1697, in which it was held that an alien enemy 'commorant' here by the king's license and under his protection might maintain an action, though he had come in time of war and without a safe conduct. It had been admitted in argument that if he had come with a safe conduct, he might bring an action; the contention was that, in the absence of such protection, he might not.

'But to that,' says the reporter, 'it was answered and resolved, that the necessity of trade has mollified the too rigorous rules of the old law in their restraint and discouragement of aliens. A Jew may sue at this day, but heretofore he could not, for then they were looked upon as enemies. But now commerce has taught the world more humanity. And as to the case in question, admit that the plaintiffs came here before the war was proclaimed, (for so it may be intended), then this action is maintainable, (1) because there was no need of a safe conduct in time of peace. (2) Though the plaintiff came here since the war, yet if he has continued here by the king's leave and protection ever since, without molesting the Government or being molested by it, he may be allowed to sue, for that is consequent to his being in protection. And Treby C. J. said, that wars at this day are not so implacable as heretofore, and therefore an alien enemy, who is here in protection, may sue his bond or contract; but an alien enemy abiding in his own country cannot sue here. . . . Note, that Treby C. J. said in this case last Trinity term, that the king may declare war against one part of the subjects of a prince, and may except the other part. And so he has done in this war with France, for he has excepted in his declaration of war with France all the French Protestants.'

This case, it may be observed, was followed in that, already mentioned, of *Usparicha* v. *Noble* (1811) 13 East, 332, in which the plaintiff, who was trading under a special license, was a subject of Spain, with which we were then at war.

'The case cited of *Wells* v. *Williams*, 1 Lord Raymond, 282,' said Lord Ellenborough, 'establishes that a plaintiff, an alien enemy in respect of the place of his birth, may, under similar circumstances of domicile, be allowed to sue in our courts.'

In *Sparenburgh* v. *Bannatyne* (1797) 1 Bos. & P. 163, the following question arose. The plaintiff, a native of Oldenburg in Germany—a State in amity with us—had taken service with the Dutch, with whom we were at war. He was taken prisoner at the Cape; thence he was sent on a British vessel, homeward bound,

which was then in want of hands. During that voyage he was treated like the rest of the crew; he did his duty to the satisfaction of the captain (the defendant); on his arrival he was taken over by the commissary with other Dutch prisoners; and at the time of action brought he was in custody as a prisoner of war. The action was brought for his wages according to the contract, and a verdict was given for £24. On a motion to set the verdict aside on the ground that the contract was one with an alien enemy, Eyre C. J. and Heath and Rooke JJ. discharged the rule: the former on the ground that the plaintiff was not a Dutch-born subject, and was not in fact an alien enemy at the time when the contract was made; the two latter on the wider ground that a prisoner of war is, for certain purposes, under the king's protection, and that he might maintain an action in certain cases, of which this was one. This view appears to have found more acceptance later. In *Maria* v. *Hall* (1800) 2 Bos. & P. 236, a French prisoner of war confined in the prison at Liverpool brought an action against the master of the ship on which he had come from the West Indies, for compensation for working the ship home. A motion was made to stay proceedings until the plaintiff should give security for costs, on the ground that the case of a prisoner of war was different from the common case of a foreigner serving on board a British ship who (as had been decided in *Henschen* v. *Garves* (1794) 2 H. Blackstone, 384; and in *Jacobs* v. *Stevenson* (1797) 1 Bos. & P. 96) was not compellable to give such security. But Heath J. 'observed, that it had been determined that a prisoner of war may maintain an action on a contract for wages,' and the Court (*absente* Lord Eldon C. J.) rejected the application.

But while the alien resident here has these various rights, he has also various duties; and the same rules which prohibit British subjects from engaging in trade with the enemy prohibit him also. This was laid down by Sir William Scott in *The Indian Chief* (1801) 3 C. Rob. 12. In that case a cargo had been shipped at Batavia (which was then in the hands of our enemy and an enemy port) on behalf of a Mr. Miller, who was an American merchant, and American Consul, at Calcutta. The cargo was captured, but the decree of condemnation was resisted on various grounds. But Sir William Scott held that the fact that the merchant was Consul did not affect his actions or his relation as merchant, and that, being resident in Calcutta, he must, so far as this matter was concerned, be taken to be a British merchant. So, also, a British subject resident and carrying on trade in an enemy's country is, equally with an alien enemy, incapable of suing in the courts of this country, as was held in the case of *M'Connell* v. *Hector* (1802)

3 Bos. & P. 113. In the case of *The Danous* (1802), cited in a note to *The Nayade* (1802) 4 C. Rob. 251, at p. 255, 'a British-born subject, resident in the English factory at Lisbon, was allowed the benefit of a Portuguese character, so far as to render his trade with Holland (at war with England, but not with Portugal) not impeachable as an illegal trade.' While in *The Neptunus* (1807) 6 C. Rob. 403, at p. 408, Sir William Scott said:—

'It has been decided, both in this Court and in the Court of Appeal, that though a British subject, resident abroad, may engage generally in trade with the enemy, he cannot carry on such a trade in articles of a contraband nature. The duties of allegiance travel with them, so as to restrain them from supplying articles of that kind to the enemy.'

And it may be added that in *The Benjamin Franklin* (1806) 6 C. Rob. 350, the Court declined to entertain a suit for wages, on the part of a British pilot, for navigating a foreign ship to an enemy's port.

But, omitting the cases of contraband and breach of blockade, neutrals who are resident outside the British dominions are not prohibited from trading with the enemies of Britain. Indeed, such trading has been recognized to be legal, and insurances with regard to it have been enforced by our tribunals. As early as 1786, Lord Mansfield, in *Gist* v. *Mason*, 1 T. R. 88, upheld a policy on neutral property, on a neutral vessel bound to an enemy's port.

'This,' said he, 'upon the face of it, is the case of a neutral vessel. It is nowhere laid down that policies on neutral property, though bound to an enemy's port, are void. . . . By the maritime law, trading with an enemy is cause of confiscation in a subject, provided he is taken in the act; but this does not extend to a neutral vessel.'

Similarly, in the case of goods which are found being traded with the enemy, if they are the property of neutrals resident abroad, and if the trading is the trading of these neutrals, the goods will not be condemned. But where the goods are apparently the property of a British subject, there must be clear proof of neutral ownership in order to avoid the penalty of condemnation. The plea has frequently failed through want of sufficiently clear proof. Thus, for instance, in *The Jonge Pieter* (1801) 4 C. Rob. 79, goods purchased in England were shipped for an enemy's port, but seized by a British cruiser; it was set up that they belonged to an American, but, in the absence of documentary proof, a decree of condemnation was made. Similarly, in *The Samuel* (1802) 4 C. Rob. 284, *n.*, where the goods had been purchased by a neutral on account of a British subject, it was held that the neutral was merely

an agent, and the British subject the principal; and the goods were condemned. The goods were also condemned in the case of *The Nayade* (1802) 4 C. Rob. 251, as the allegation that they belonged to a neutral was held not to have been made out. In *The Franklin* (1805) 6 C. Rob. 127, a shipment of tobacco had been made from Virginia to France, with which we were then at war, and had been captured by a British cruiser. The property appeared to be the joint property of I. and W. Bell, partners of a trading house in America and in London, the one being resident across the Atlantic, and the other here. It was contended that the latter had in fact no interest in the shipment, but he was unable to produce satisfactory evidence to this effect, and the Court, being of opinion that there was a joint interest in the property, condemned a moiety of it.

The old general rule that the property of an alien enemy may be seized and confiscated has been modified in various ways so far as that property when in the country of either of the belligerents is concerned; and as regards the capture of such property at sea, there is the important clause (2) in the Declaration of Paris, 1856, that 'The neutral flag covers enemy's goods, with the exception of contraband of war.' But these exceptions have no reference to the case of goods belonging to the enemy, and found on a ship belonging to either of the belligerents. In such case, the old general rule still prevails. And it may be added that goods which are in the course of transit to the enemy, and which are designed to become the enemy's property on arrival, are treated generally as enemy's goods. Thus in *The Sally* (1795) 3 C. Rob. 300, *n.*, the judgment of the Lords—present, the Earl of Mansfield, Sir R. P. Arden (Master of the Rolls), and Sir W. Wynne—was as follows:—

'It has always been the rule of the Prize Courts, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemy's property. When the contract is made in time of peace or without any contemplation of war, no such rule exists:—But in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place.... Supposing that it was to become the property of the enemy on delivery, capture is considered as delivery: The captors, by the rights of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property.'

The same rule was applied by Sir William Scott in *The Atlas* (1801) 3 C. Rob. 299, and *The Anna Catharina* (1802) 4 C. Rob. 107, while it was held not to be applicable—owing to the fact that the contracts had not been made in contemplation of war—in *The Vrow*

Margaretha (1799) 1 C. Rob. 336, and *The Packet de Bilboa* (1799) 2 C. Rob. 133. In the latter case Sir William Scott considered the rule at some length, saying that the same treatment which is given to such contracts when made in time of peace cannot be given to them in time of war: 'for it would at once put an end to all captures at sea; the risk would in all cases be laid on the consignor, where it suited the purpose of protection; on every contemplation of a war, this contrivance would be practised in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture.' And it may be observed that in this respect the law of the United States appears to be similar to our own (Kent's Commentaries, vol. i. p. 87; Halleck's International Law, 1878 ed., vol. ii. p. 130).

The subject of the last paragraph, as well as the general subject of this paper, have, happily, for many years been matters of legal history rather than of practical law. But the recent Transvaal war has brought them again within the latter sphere, and the case of *The Mashona*, decided at Cape Town on March 13, 1900—reported in *The Cape Times* of the following day—furnishes the most recent decision. The facts in that case were briefly as follows. Shortly after the outbreak of the war between Great Britain and the Transvaal, *The Mashona*, a British ship, sailed from New York with cargo for Algoa Bay, which was to be the first port of call, and Delagoa Bay. Some of the cargo was consigned to individuals and to firms carrying on business at Pretoria and other places in the Transvaal; this was to be landed at Delagoa Bay, and thence sent on to its inland destination by rail in the ordinary course. *The Mashona* proceeded on her voyage direct to Algoa Bay, but just before she reached it she was seized by H.M.S. *Partridge*, and brought to Table Bay, where she was placed in the custody of the marshal of the Prize Court. Both the cargo consigned to the Transvaal and the vessel herself were claimed as lawful prize: the former on the ground that it was enemy's property and unprotected; the latter on the ground that she, a British ship, was trading with the enemy. Against these charges it was contended that the consignees were hostile only by reason of domicile, and that they had done what they could to change the destination of the goods; that, as regards the ship, neither the owners, the charterers, nor the master had any intention to trade with the enemy, that they had acted with perfect good faith, and that the master had in fact intended to pass a bond at Algoa Bay undertaking not to take the goods to Delagoa Bay without the permission of the proper authorities. The case came before the Supreme Court of Cape Colony, sitting as a Prize Court, and, singularly enough, the three judges

who composed it—the Chief Justice, Mr. Justice Buchanan, and Mr. Justice Lawrence (Judge-President of the High Court of Griqualand West)—came to different conclusions. The Chief Justice was of opinion that the cargo in question should be condemned, but not the ship; Mr. Justice Buchanan that neither ship nor cargo should be condemned; and Mr. Justice Lawrence that a sentence of condemnation should be pronounced against both. In the result, since the Court was divided two to one in favour of condemning the cargo, and two to one against condemning the ship, the cargo in question was condemned and the ship restored.

As regards the goods, it may be mentioned that the members of the Court differed, on the facts, as to whether the owners of the goods had done all in their power to alter the destination of them—Mr. Justice Buchanan considering that they had, the Chief Justice and Mr. Justice Lawrence that they had not. This question of destination, however, though discussed at some length, seems of secondary importance, except as showing that the goods were the property—or, in prize law, should be regarded as the property—of residents in the Transvaal; and such ownership was not apparently denied. The main reason for condemning the goods appears rather, from the judgments of the two last-mentioned judges, to have been that the goods were enemy's goods, captured on the high seas and on a non-neutral ship. It will, however, be observed that this view involves the assumption that the rules which apply to the capture of goods belonging to the enemy because they belong to the enemy, apply also to the capture of goods belonging to those who are impressed with enemy character not by nationality but only by domicile. It does not appear that any cases were cited to this effect. But there is, as has already been shown, ample authority for the proposition that, in question of trading with the enemy, those who are resident in the enemy's territory are generally to be regarded as enemies; and it may well be considered that a like principle is applicable to the question of property in goods, particularly when those goods are on their way to the enemy's country.

With regard to the ship, the question turned mainly as to whether, on the facts, she came under the rule laid down in *The Hoop*, or whether her case was analogous to those of *The Minna* and *The Mercurius* already referred to. The Chief Justice, who delivered the leading judgment, took the latter view. He referred particularly to these three cases, and, after quoting the words at the close of Lord Stowell's judgment in *The Mercurius*—'I cannot, under any view of the case, bring myself to regard it as a fraudulent continuous voyage; there was no act, either done or to be done, to found the imputation of fraud; on the contrary, there is sufficient

proof of an honest intention to come to this country to procure the license, and to act conformably to it when granted'—he went on to say:—

'In the same manner there appears to me sufficient proof in the present case of an honest intention to pass a bond undertaking not to take the goods to Delagoa Bay except with the permission of the proper authorities. There was no concealment on the part of the charterers, or the owners, or the master; on the contrary, they all acted with the utmost *bona fides*, and with the sincere desire to give the authorities all the information and assistance in their power. . . . The presumption of an intention of trading with the enemy, arising from the fact that the ship was carrying enemy's goods consigned to Delagoa Bay and destined for the enemy's country, is entirely rebutted by the conduct of all the parties interested in the ship. The claim for restitution of the ship must consequently be allowed.'

And the judgment of Mr. Justice Buchanan proceeds on the same general view, and is to the same effect.

The judgment of Mr. Justice Lawrence—which, with regard to the ship, is the dissenting judgment—cannot, however, be lightly passed over. After dealing with the case of the cargo and with some questions relating to the ship, Mr. Justice Lawrence goes on to say:—

'It appears to me that, as soon as the war broke out, it became the duty of the master to decline to convey any goods which, from the papers in his possession, appeared to be the property of enemy consignees. His contract of affreightment could not lawfully be fulfilled, and he should have acted as laid down in the passage from Lord Tenterden's book, cited above. The only point which remains is the question whether it has been established that there was no intention on the part of the master of the ship to trade with the enemy except with permission of the proper authorities. In the circumstances, such a defence must be established by very clear proof; and, although there is no reason whatever to impute any disloyal intention, or *mala fides*, to the owners, charterers, agents, or master, I have come reluctantly to the conclusion that the proof of non-liability on this ground has not been made out. Had the ship first touched at Cape Town, a course would doubtless have been adopted which, as in other cases, would have secured immunity; and it certainly seems probable, after what happened in the case of *The Beatrice*, that a similar course would have been followed in this case, had it not been for the intervention of *The Partridge* at Port Elizabeth. . . . In the case of *The Mercurius*, decided by Lord Stowell in 1808 (Edwards, 53), which is certainly the strongest case in favour of the claimants, the court held it proved that she was, when seized, on her way to a British port for the purpose of applying for a license to proceed from a hostile to a neutral port. That she had directions to do so was, as the court held, "disclosed in the

papers, and as strongly guaranteed as any fact could be." If in this case *The Mashona* had taken a cargo at New York for Delagoa Bay only, but was proved to have touched at a British port *proprio motu* and under directions from the charterers, for a similar purpose, the cases would have been parallel. As it is, I fear that the parallel fails in an essential particular. In the present case, as I suggested during the argument, there seems to be an absence of proof that it was not the intention of the master to deliver these goods to the consignees unless prevented from doing so by some competent authority; and this cannot be regarded as equivalent to proof that he intended to apply for and obtain a license before engaging in intercourse which, in the absence of the license, was of an unlawful character. From the moment that this ship left New York harbour I think she was liable *stricto jure*—a liability which she doubtless shared with many other vessels of the British Mercantile Marine—to seizure and condemnation; as she was still without a license when seized, *stricto jure* the liability remains. At the same time I must add that I in no way regret that my colleagues have been able to come to the conclusion that the further proof adduced by the charterers is sufficient for the discharge of the ship; since, had she been condemned, it would have been difficult to conceive a stronger case for the indulgence of the Crown.'

It need hardly be observed that the prohibition against trading with the enemy is of a much more comprehensive character than the provisions against contraband and breach of blockade; because, while the latter are matters principally as between the belligerent state and neutrals, the former is a matter between the belligerent state and its own subjects. The distinction between the two was clearly pointed out by Sir William Scott in the case of *The Jonge Pieter* (1801) 4 C. Rob. 79, cited in both the judgments above quoted. That case had reference to the condemnation of a shipment of goods made in London for Embden, and, as appeared in the papers, with an ulterior purpose of sending them on to Amsterdam, which was then blockaded by the British.

'The whole case,' said Sir William Scott, 'turns on the question of property. . . . Whether the property is to be taken as residing in the English shipper, or in the American merchant for whom it is claimed. If they are the goods of the American merchant, the only question will be, Whether, Amsterdam being under blockade, such a trade is not liable to the penal consequence of breaking the blockade? If they are the property of English subjects, the same question will arise: and also, an additional question, Whether, on their part, it is not such a circuitous trading with the enemy as will make the property, on that ground, liable to confiscation?

'On the first point, supposing the cargo to be American property, I am not inclined to think that it would be affected by the blockade, on the present voyage. The blockade of Amsterdam is, from the nature of the thing, a partial blockade, a blockade by sea; and if

the goods were going to Embden, with an ulterior destination by land to Amsterdam, or by an interior canal navigation, it is not, according to my conception, a breach of the blockade. But in the case of a British subject, shipping goods to go to the enemy, through a neutral country, I am afraid the penalty would be incurred. Without the license of Government no communication, direct or indirect, can be carried on with the enemy. . . . The interposition of a prior port makes no difference; all trade with the enemy is illegal; and the circumstance that the goods are to go first to a neutral port will not make it lawful. The trade is still liable to the same abuse, and to the same political danger, whatever that may be. I can have no hesitation in saying that, during a war with Holland, it is not competent to a British merchant to send goods to Embden, with a view to sending them forward on his own account to a Dutch port, consigned by him to persons there, as in the ordinary course of commerce.'

Sir William Scott then went on to consider whether there was sufficient evidence to rebut the presumption that the goods in question were the property of the British merchant who had shipped them, and, finding that there was not, pronounced for confiscation.

J. Dundas White.

THE COMPANIES ACT, 1900.

THE policy of the Legislature in the Companies Act, 1862, was to allow Companies formed under it the utmost freedom both in dealing with the public and in managing their own internal affairs. Certain safeguards it was necessary to adopt where companies were trading on contributed capital and with limited liability; but they were few and simple: that the company should be kept to the objects defined in its memorandum of association, that notice of a company's liability being limited—where it was so—should be brought home to all persons dealing with it, that shares should be paid for in full either in cash or its equivalent, and that the capital so contributed—the creditors' only available fund—should by no artifice or subterfuge be reduced without the sanction of the Court: these may be said to almost exhaust the list of statutory safeguards. To say that this policy of commercial freedom has proved a failure would not be true: so far from this being the case it has conferred very great benefits on the country, and given an extraordinary stimulus to co-operative enterprise; but it has undeniably been attended with certain mischiefs. Unscrupulous persons, promoters for the most part, have abused the opportunities which the joint stock company system has afforded them, and have enriched themselves by plundering the public and foisting on it worthless schemes at extravagant prices by artful advertising. Something, it has long been felt, had to be done, or attempted, towards checking these frauds, and the Companies Act, 1900, represents the best that the combined wisdom of legal and commercial experts can do for their frustration.

The Act, like every other Act, has its perspective. There are useful provisions, for instance, inserted in it for making a company's certificate of incorporation conclusive, for enabling creditors to apply in a voluntary winding-up, for clearing the Register of Joint Stock Companies of companies which have ceased to carry on business, for rectifying certain abuses in connexion with companies limited by guarantee: but these provisions occupy a subordinate position; they may be described as 'odds and ends' swept in by the legislative broom: not integral parts of the scheme

of the Act. The salient points of the Act, which embody its policy, are in the main four:—

1. To compel full disclosure of material facts in a prospectus by requiring it to set out specific particulars about the company.
2. To secure a certain degree of substantiality in every company before it commences business.
3. To make the first or statutory meeting of shareholders a reality.
4. To establish at Somerset House a register, accessible to all, of a company's principal documents and proceedings.

To touch on each of these very briefly:—

1. It is 'pretty to observe,' as Mr. Pepys would say, the successive efforts to extract candour from the authors of prospectuses. The Legislature began by trusting to that general duty of honesty and good faith on the part of directors, which was so eloquently expounded by Vice-Chancellor Kindersley in *New Brunswick Central Railway Co.* v. *Muggeridge*, 1 Dr. & Sm. 381. But the Vice-Chancellor's 'golden legacy,' as Lord Hatherley called it, savoured a little too much of a 'counsel of perfection.' Directors could not or did not live up to it, and so in the Companies Act, 1867, s. 38, the Legislature supplemented it by exacting something more definite—the dates and the names of the parties to any contract entered into by the company, the directors, or promoters. Still disclosure was coy, and the Directors' Liability Act, 1890, was passed, visiting directors with damages for any untrue statement in a prospectus made without reasonable grounds—which includes any statement made untrue by a suppression. In the new Act we have the Legislature requiring a prospectus to set out a long list of specified particulars about the company—the contents of the memorandum of association, the names of the directors and the amount of their qualification (if any), the minimum subscription—of which more anon—the number of shares and debentures issued, and the consideration for them, the names and addresses of the vendors—which word is given the widest meaning by the Act—the amount of purchase money, of underwriting commission, of promotion money, the date and parties to every material contract, with a provision for its inspection, full particulars of the nature and extent of the interest of any director—everything in fact which it can possibly concern the recipient of a prospectus to know in order to determine whether he will or will not apply for shares.

The criticism which suggests itself on this—the most important—point of the Act is that the information to be given is so extensive

and multifarious that it is very doubtful whether the recipient of a prospectus will trouble himself to go through these answers to statutory interrogatories, more particularly those which mainly concern him as to the company's vendors, their contracts, and interests. It will not be difficult for the disingenuous promoter to comply with the letter without complying with the spirit of the enactment, and to bewilder in lieu of enlightening.

2. This point of policy, the guarantee of substantiality, is to be found in the sections dealing with 'Going to Allotment' and 'Commencement of Business': a minimum subscription—exclusive of shares paid for otherwise than in cash—must have been obtained, or shareholders are not to be held to their offer to join the enterprise, and their subscriptions are to be forthwith returned; furthermore, the company is not to commence business till it has got a certificate from the Registrar of the statutory conditions having been fulfilled. Pending this certificate *no contracts are to be binding on the company.* The 'minimum subscription' is of course meant to put an end to the too common practice of directors going to allotment on a scandalously inadequate subscription, and does but express what is almost an implied term in every application for shares. The weak point in the legislation is that the minimum subscription is fixed by the articles, which means that it is fixed by the promoters, who are not likely to put it impracticably high: rather, if anything, too low. All that has to be paid up on this minimum is five per cent., so that the statutory conditions will not be much of a test of financial stability; on the other hand, the official certificate entitling the company to commence business is calculated to give the company a fictitious credit with the public.

3. The provisions on this head—as to the statutory meeting—are designed to bring the shareholders on the scene at an earlier date than hitherto, so that they may exercise a real control over the management of the company. The novelty in these provisions consists in the certified report which the directors are required to circulate among the shareholders seven days previously to the meeting, informing them as to the number of shares allotted, the cash received, receipts and payments, and other matters, which will enable the shareholders, when they do meet, to discuss the affairs of the company intelligently. Hitherto, they have had to put up with as much—or as little—information as the directors have deemed it discreet to allow them. The efficacy of the section must, however, depend on the shareholders themselves; whether they will avail themselves of the opportunities of the occasion and really look after their own affairs, or give themselves away by signing proxies in favour of some nominee of the directors or promoters.

4. The last point is the keeping of what is in effect a public file of the company's principal records and proceedings at the Registry of Joint Stock Companies. It is no longer only the memorandum and articles of association and any special resolution which have to be registered at Somerset House, but the prospectus of the company —before it can be issued—, the consent of a person to act as director, the return as to allotments, the statutory declaration preliminary to commencing business, the report of particulars for shareholders prior to the statutory meeting, and, most important of all, mortgages and charges created by the Company. If these are not registered within twenty-one days from creation they are to be void, quâ security, against a creditor of the Company, or against the liquidator. The singular thing is that the Act does not provide for registration at Somerset House of all a company's mortgages and charges, but only of four specified classes, to wit:

(*a*) a mortgage or charge for the purpose of securing any issue of debentures; or

(*b*) a mortgage or charge on uncalled capital of the Company; or

(*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

(*d*) a floating charge on the undertaking or property of the Company.

These are not exhaustive, and the consequence must be that a lender who wishes to be safe will be driven back on the company's own register of mortgages and charges at its office —the very thing which it seems to have been the aim of the Act to get rid of.

Prophesying is, according to George Eliot, the most gratuitous form of error, and as such to be avoided, but it seems not unlikely that the more unpretending sections of the new Act — the 'odd-ments'—may in the end prove the most useful.

EDWARD MANSON.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The County Palatine of Durham: a study in constitutional history. By Gaillard Thomas Lapsley. New York, London and Bombay: Longmans, Green & Co. 1900. 8vo. xi and 380 pp. ($2 net.)

Mr. Lapsley's work is a fresh proof of the excellent training received by the rising generation of American historical scholars. It is thorough, careful and systematic, and quite free from the ambition of producing something novel, even at the cost of paradox, which is not unknown in Europe. We have here the rise, culmination and decadence of the Bishop of Durham's princely franchise for the first time set forth as a whole. Mr. Lapsley dismisses the common view of a deliberate royal foundation as being wholly devoid of evidence. He considers the rival hypothesis of an intimate connexion with the early independence of Northumbria (which is itself far from certain) plausible but still unproven. His own suggestion is that in any case the see of Durham was the greatest lord in that region both before and after the Norman Conquest, and was enabled to magnify its immunities in the twelfth and thirteenth centuries by skilful and determined use of favourable circumstances. Perhaps there is no stronger illustration of the power of the Crown in England than the amount of power which the King could afford to leave to the Bishop of Durham. The Bishop had his own courts with exclusive jurisdiction, and his own peace; he was an immunist on a grand scale, taking all that the King would have taken elsewhere. Once the King begged a deodand of him as matter of grace. The Bishop as temporal lord issued writs of prohibition to himself as spiritual judge. He exercised the prerogative of pardon. He coined money. He had his exchequer, an enlightened exchequer which used not tallies but indentures. He had his own great officers, and his sheriff assumed the power of gaol delivery till the fourteenth century. Certainly the Bishop ought not to have negotiated with the Scots on his own account, but certainly he sometimes did. The liberty of the bishopric taxed itself separately till 1449, though in practice it copied the action of Parliament. In any other kingdom the Bishop would have become a prince independent in everything but name. But here the royal supremacy was never in real danger. There was no time when the King could not, at need, say 'No farther' and say it with effect. Under the centralizing Tudor rule the substantial though not formal end came by a kind of dignified suicide, when Tunstall, Bishop of Durham, was a willing president of the Council of the North. F. P.

A Concise Treatise on the Law of Wills. By H. S. THEOBALD. Fifth Edition. London: Stevens & Sons, Lim. 1900. La. 8vo. cxxxix and 861 pp. (32*s.*)

THE fourth edition of this most useful book on Wills was issued in 1895, and subsequent decisions upon the construction of wills have been sufficiently numerous to make a fifth edition very acceptable, and to increase the length of the text by more than seventy pages.

During this interval there do not appear to have been any new decisions which are likely to take rank as leading cases, for we can have no better authority than the learned author for the statement in the preface to the new edition, that the new cases have not established any new principles.

The chapter on 'Election' has been re-arranged and improved, but it is disappointing to find that no attempt has been made in this chapter to explain the meaning of the well-known but ambiguous expression 'free disposable property,' or to discuss more fully the doubtful application of the 'engrafted doctrine of compensation' to the case where a person elects to take under a will which raises a case of election.

Other chapters, particularly those on Charitable gifts, and on Satisfaction and Ademption, and on Administration, have been to a considerable extent rewritten, and in all cases the new matter includes and incorporates recent decisions down to June 1900.

No purchaser of this edition will regret that the lapse of time since the Wills Act was passed has made it now possible to eliminate much of the old law of wills which had comparatively little application to wills made since the passing of the Act.

The Parliamentary Election Manual. By T. C. H. HEDDERWICK, M.P. Second Edition. London: Stevens & Sons, Lim. 1900. 8vo. xxviii and 386 pp. (10*s.* 6*d.*)

THE issue of a second edition of Mr. Hedderwick's work is cunningly timed. We know of no handier or more useful book on election law. It contains information on most things that a candidate or election agent wants to know. It includes chapters on candidates, election agents, unpaid agency, committee-rooms, public meetings, election expenses, and returning officers' charges, and gives annotated reprints of the Corrupt and Illegal Practices Prevention Acts, 1883 and 1895.

Apart from mere legal information the author is able to draw on his political experience for many practical hints as to the working of a parliamentary election. A careful perusal of the section on Unpaid Agency would enable many candidates to avoid the pitfalls awaiting them. For instance, how many persons not versed in election law know that the mere possession of a canvass book, or the fact of driving about the constituency with the candidate, may be evidence of agency? In the *Stroud* case, as Mr. Hedderwick points out, the Court held that the plaintiffs had established the agency of a person who not only had no canvass book, but who was told by the candidate's election agent that he could not employ him. Mr. Hedderwick's advice to members of election committees is summed up in the golden rules: (1) pay nothing, (2) give nothing, (3) promise nothing.

If candidates and their agents duly note the warnings given in the first 200 pages of this book there will be small danger of an enforced reference to the section on Election Petitions some months hence.

Principles and Practice of Conveyancing, intended for the use of students and the profession. By JOHN INDERMAUR. London: Geo. Barber. 1900. xxii and 602 pp. (29*s.*)

THERE can be no doubt that this work is best adapted for use by students and others in the course of their preparation for the solicitor's examination. To those who know the work it may also be of some value in their subsequent practice, but it can hardly lay claim to be, in any proper sense, a practitioner's book of reference.

The style throughout is more or less colloquial, and the book is manifestly intended to be read immediately before an examination, and only after the student has gathered a knowledge of the law from other sources.

In the first edition of a book ranging over so wide a field it is too much to expect that the author should make no slips or material omissions, but inasmuch as it is of the utmost importance for a student to obtain a correct grounding, it may be well to refer here to a few of the points which seem to have escaped the author's attention.

Thus the author (p. 11) classes a right to dower among estates for life created by operation of law. When the beneficial rights of a doweress are considered this must appear to be incorrect. An estate by the curtesy is no doubt a true life estate, and the holder has the powers of a tenant for life under the Settled Land Acts; not so a doweress, who, for practical purposes, is treated as an incumbrancer, though in certain cases she may have a limited power under the Settled Estates Act, 1877, to grant a lease.

The power for the lord of a manor by custom and with the consent of the Board of Agriculture to grant out waste by copy of court roll (p. 71) seems to have been overlooked.

At p. 69 the rule that in construing wills the Court will, by analogy, have regard to the Statutes of Uses for the purpose of ascertaining in whom the legal estate is vested, seems to have been disregarded. Though the legal estate will now vest in the personal representative the point is still of importance, for after administration he must convey to the proper uses of the will.

In discussing the tortious operation of a feoffment (p. 138) the author ignores the practical value of the tortious operation, and omits to state that under the Conveyancing Acts a long term can now, in a proper case, be enlarged, thus, in effect, restoring the old power.

The statement (p. 261) regarding the title to be shown to land on the preparation of a settlement goes beyond the practice of conveyancers. In the proper sense of the term there is no investigation of title, though the settlor provides sufficient materials to enable the other side to prepare the draft and generally check the position. Moreover the practice, in complicated cases, for each side to prepare their own draft is now becoming very general.

The requisition given at p. 319 respecting a tenant by the curtesy appears to be somewhat out of date, for unless title is made under Part I of the Land Transfer Act, 1897, by virtue of the paramount power of sale of the personal representative (in which case no release would be required), a tenant by the curtesy must either be the vendor or must, as a person having the statutory powers of a tenant for life, join to consent to the trustees exercising their power of sale.

The Law of Animals. By JOHN H. INGHAM, of the Philadelphia Bar. Philadelphia: T. & J. W. Johnson & Co.; London: Stevens & Haynes. 1900. 8vo. 698 pp.

A writer in the 'Revue de Droit International' has recently been discussing 'L'Animalité et son Droit.' Is there beyond 'la grande société de tout le genre humain' a further zone embracing animals? Yes! he answers; true, it has not yet organized itself, this law of animals, but it is tending to do so. The present work illustrates the drift; not that Mr. Ingham is at present prepared to give animals independent rights as distinguished from their rights derived through man, but he is the first to deal—and it is greatly to his credit—with the law of animals as a whole, the first to systematize and rationalize the subject, disengaging its elements from the numberless statutes, reports, digests, and text-books among which it lies scattered. In the seven titles which make up the book the author discourses of Property in Animals—wild and domestic; of the Transfer of Animals—sale, mortgage, and estrays; of the Rights of Owners of Animals; of Injury and Theft; of the Liability of Owners of Animals—trespass, nuisance, and vice; of Bailment and Carriage; and, lastly, of Cruelty to Animals. Some natural regret we cannot help feeling—though it seems ingratitude after being conducted over such a field of learning—that the author did not supplement his discussion of general principles with a digest of the law classified under familiar heads, such as dog, horse, elephant; but no doubt the ready answer would be that to do so—with case law growing at the rate it is both in America and England—would have been to treble or quadruple the size of the work. Already in England the horse has a good sized volume to himself, and the dog is the theme of more than one separate work.

The scienter doctrine which figures so largely in connexion with mischievous animals is one of those doctrines which America owes to England, and for which American lawyers, we gather from Mr. Ingham, are not particularly grateful. Even in the land of its birth the doctrine is recognized as at once too lax and too strict: too lax because it casts on the victim the onus of bringing home knowledge to the owner, too strict because when that knowledge is brought home he becomes an insurer. American law takes the sting out of this last liability because it only exacts in the case of fierce animals special care and precautions. Surely the most rational rule is that adopted by most foreign systems, making the owner of an animal *primâ facie* liable for the injury it does, leaving him to clear himself by proving reasonable care, if he can. This scienter question is only one of many interesting points of likeness and unlikeness between American and English law brought into relief by Mr. Ingham's excellent treatise. He is full of suggestive questions. Does, for instance, the fact that a horse is running away in a street without a driver raise a presumption of negligence? Is there property in a cat? Is an oyster tame or wild? We know 'an oyster may be crossed in love,' but it is difficult to conceive of it as 'ferae naturae.'

We have also received:—

Attachment of Debts, Receivers by way of Equitable Execution, and Charging Orders on Stock and Shares. By MICHAEL CABABÉ. Third Edition. London: Sweet & Maxwell, Lim. Sm. 8vo. xiv and 199 pp. (6*s.*) —The principal feature of the new edition of Cababé on Attachment, &c.,

is a new chapter, 21 pages long, on 'Charging Orders on Stock and Shares,' with an Appendix of Forms with reference to this branch of the practice. This Appendix is separate from appendices of forms in attachment and receivership proceedings. The book has three indices, one to Attachment of Debts, another to Receivers by way of Equitable Execution, and the third to Charging Orders. Mr. Cababé shows the creditor what pitfalls he must avoid on his way to obtaining the fruits of proceedings to compel payment of the debts justly owing to him, and it is impossible to disagree with the statement in the preface that the law and practice on the subject of execution generally are unsystematic.

The Principles of Pleading, Practice and Procedure in Civil Actions in the High Court of Justice. By W. BLAKE ODGERS, Q.C. Fourth Edition. London: Stevens & Sons, Lim. 1900. 8vo. lx and 494 pp. (12*s.* 6*d.*)—Mr. Blake Odgers's book on Pleading is too well known to need much comment. There do not appear to be many changes in this edition. A new chapter on 'Summons for Directions' has been added in consequence of the amendment of R. S. C., Ord. XXX; recent decisions have been duly noted, and the work generally brought up to date.

Principles of the Law of Personal Property. By the late JOSHUA WILLIAMS. Fifteenth Edition by T. CYPRIAN WILLIAMS. London: Sweet & Maxwell, Lim. 1900. 8vo. lxxxi and 631 pp. (21*s.*)—It is almost impossible to do more than to note the appearance of a new edition of a legal classic like 'Williams on Personal Property.' In this edition the portion of the work dealing with the order of payment of debts in administration has been re-written in consequence of the decision in *Re Leng, Tarn* v. *Emmerson* [1895] 1 Ch. 652, and some additions have been made to the chapter on Settlements.

Historical Jurisprudence: an Introduction to the systematic study of the development of Law. By GUY CARLETON LEE. New York: The Macmillan Co. London: Macmillan & Co., Lim. 1900. 8vo. xv and 517 pp. (12*s.* 6*d.* net.)—This book gives a summary view of the principal ancient systems of law (we do not know why Hindu law has a chapter to itself and Mahometan law is all but ignored); the history of Roman law and its modern reception is briefly traced; and the last chapter sketches the growth of English law down to Bracton.—Review will follow.

The Licensing Acts: being the Acts of 1872 and 1874, together with all . . . Acts relating thereto, with Introduction, Notes, &c. By the late JAMES PATERSON. Thirteenth edition by WILLIAM W. MACKENZIE. London: Shaw & Sons: Butterworth & Co. 1900. 8vo. lvii, 422 and 72 pp. (12*s.*)—'Paterson on the Licensing Acts' is a compact handbook to all points of licensing law. In this edition the notes have been revised, and, so far as we can see, all recent cases incorporated. Even so late a case as *R.* v. *Worcestershire Justices*, decided on July 25 last, will be found on p. 253. Reports of the important cases of *Sharp* v. *Wakefield*, and *Boulter* v. *Kent Justices*, have also been added to the Appendix.

A Selection of Legal Maxims, classified and illustrated. By HERBERT BROOM. Seventh edition by HERBERT F. MANISTY and HERBERT CHITTY. London: Sweet & Maxwell, Lim. 1900. La. 8vo. 749 pp. (28*s.*)—We are already pretty far from the time when a desultory compilation of this kind could pass muster as a serious contribution to legal science, and

we doubt whether the attempt to revive it by posting it up with modern references can be of much use either to practitioners or to students. The one thing which it might have been worth while to do, to trace our current Latin maxims to their origins where possible, and note how far their civilian or canonical meaning has been perverted, was wholly omitted by Mr. Broom and has not been supplied by his editors. We do not doubt that the posting up has been well done.

Journal of the Society of Comparative Legislation. New Series, No. 5. Aug. Edited for the Society by JOHN MACDONELL, C.B., and EDWARD MANSON. London: John Murray. 1900. 8vo. 195–406 pp. (5*s.* net.)—Among the more important articles in this number are papers on 'Status in connection with Colonial Marriages,' by Lord Davey; 'Disciplinary Jurisdiction over Solicitors,' by Mr. H. E. Gribble; 'The Support of War by War,' by Mr. J. S. Risley; 'The Law of South Africa,' by Mr. W. F. Craies; 'Appeals under the Commonwealth of Australia Constitution Act,' by Mr. A. R. Butterworth; 'Modern Developments of Mohammedan Law,' by Sir Raymond West; 'Recent Legislation as to Inebriates in England and the Colonies,' by Mr. Ernest M. Pollock and Mr. A. M. Latter; and 'Nobility in England,' by Mr. E. Manson. The number contains an excellent portrait of the late Lord Chief Justice.

Ruling Cases, arranged, annotated and edited by ROBERT CAMPBELL. With American Notes by LEONARD A. JONES. Vol. XXI. Payment—Purchaser for value. London: Stevens & Sons, Lim. Boston, U.S.A.: The Boston Book Co. 1900. La. 8vo. xxvi and 847 pp. (25*s.* net.)—Among the important subjects dealt with in this volume are Payment, Pilotage, Poor, Power, Principal and Surety, and Purchaser for value without notice.

Coote's Common Form Practice and Tristram's Contentions Practice of the High Court of Justice in granting Probates and Administrations. Thirteenth Edition. By T. H. TRISTRAM, Q.C., D.C.L. The Common Form portion revised by HENRY A. JENNER. London: Butterworth & Co. 1900. 8vo. xlv, 912 and 82 pp. (32*s.* 6*d.*)

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND, D.C.L. Ninth Edition. Oxford: at the Clarendon Press, London & New York: Henry Frowde. 1900. 8vo. xvi and 430 pp. (10*s.* 6*d.*)

A Handbook of Thames River Law. By G. PITT-LEWIS, Q.C. London: Effingham Wilson. 1900. 8vo. ix and 410 pp. (15*s.* net.)

The Law of Agency. By R. G. WOODYATT. London: Wm. Clowes & Sons, Lim. 1900. 8vo. xx and 196 pp. (8*s.* 6*d.*)

The Law and Practice relating to Letters Patent for Inventions. By R. W. WALLACE, Q.C., and J. B. WILLIAMSON. London: Wm. Clowes & Sons, Lim. 1900. La. 8vo. lxv and 922 pp. (£2.)

The Practice of Private Bills, with the Standing Orders of the House of Lords and House of Commons, and Rules as to Provisional Orders. By GERALD JOHN WHEELER. London: Shaw & Sons; Butterworth & Co. 1900. La. 8vo. xx and 531 pp. (25*s.*)—Review will follow.

Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius. Seventeenth Edition. By MAURICE POWELL. Two vols. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1900. 8vo. clxix, iv and 1539 pp. (£2 2*s.*)

The Law and Practice of Rating. By WALTER C. RYDE. London: Shaw & Sons; Butterworth & Co. 1900. La. 8vo. lix, 756 and 54 pp. (35*s.*)

Precedents of Deeds of Arrangement between Debtors and their Creditors, with introductory Chapters. By G. W. LAWRANCE. Fifth Edition. By ARTHUR LAWRENCE. London: Stevens & Sons, Lim. 1900. 8vo. xii and 183 pp. (7*s.* 6*d.*)

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XLV. 1837–1838. (2 & 3 Mylne & Craig, 6 & 7 Adolphus & Ellis, 2 & 3 Nevile & Perry.) London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1900. La. 8vo. xiv and 859 pp. (25*s.*)

Metropolitan Borough Councils Elections. A guide to the election of the Mayor, Aldermen and Councillors of Metropolitan Boroughs. By JOHN HUNT. London: Stevens & Sons, Lim. 1900. 8vo. viii and 140 pp.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
